No. 92-1915

Supreme Court, U.S.
FILED
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA

Petitioners,

VS.

GETTY OIL COMPANY AND
TEXACO INC.,

Respondents.

On Writ of Certiorari to the Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it constitute a denial of due process of law under the 14th Amendment to the United States Constitution if a state court of last resort, on plaintiff's appeal of a grant of summary judgment for defendants, reverses and grants a *sua sponte* partial summary judgment in favor of the plaintiff, when:

(i) the denial of plaintiff's earlier motion for partial summary judgment was neither appealed *nor appealable*, so that it was not before the court;

(ii) defendants' responses to plaintiff's prior motion for partial summary judgment were not contained in the appellate record (because they were not relevant to the limited motion which was on appeal);

(iii) defendants were given no notice that plaintiff's motion for partial summary judgment would be considered by the court; and

(iv) defendants had no opportunity to present their defenses to plaintiff's motion before any appellate court, and will, as a result of the court's binding ruling, proceed to trial and final judgment without ever being afforded the opportunity to present their defenses on a critical issue?

LIST OF PARTIES

A. Petitioners:

(1) Youell & Companies, a consortium of offshore insurance companies and Lloyds syndicates consisting of Bermuda Fire and Marine Insurance Company, Limited; "Winterthur" Swiss Insurance Company, Limited; Compagnie Europeenne d'Assurances Industrielles S.A.; CNA Reinsurance of London, Ltd.; Lexington Insurance Company; British National Life Insurance Society, Ltd.; Lloyds syndicates Nos. 190, 210, 918, 989, 279, 650, 940; Sovereign Marine & General Insurance Company, Limited; Toyko Marine & Fire Insurance Company (U.K.), Limited; Taisho Marine & First Insurance Company (U.K.), Limited; Allianz International Insurance Company, Limited; Storebrand Insurance Company (U.K.), Limited; The Dominion Insurance Company, Limited; Stronghold Insurance Company, Limited; Folksam International Insurance Company (U.K.), Limited; Yasuda Fire & Marine Insurance Company (U.K.), Limited

(2) Insurance Company of North America

B. Respondents: Getty Oil Company and Texaco, Inc. (referred to herein as "Texaco")[1]

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[1] In the trial court, the plaintiff identified itself as "Getty Oil Corporation, succeeded by and a division of Texaco, Inc." There is some dispute below as to the identity of the proper party plaintiff, and any reference herein to "Texaco" shall be without any prejudice to the resolution of that issue. That dispute does not affect the deliberations of this Court.

C. Additional Parties Below: NL Industries, Inc.; Walbrook Insurance Company, Limited; El Paso Insurance Company, Limited; Dart Insurance Company, Limited; Louisville Insurance Company, Limited; Mutual Reinsurance Company, Limited

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REFERENCES TO PRIOR OPINIONS IN THIS CASE

The opinion of the Texas Supreme Court, issued on November 11, 1992, is reported in *Getty Oil Company and Texaco Inc. v. Insurance Company of North America, et al.*, 845 S.W.2d 794 (Tex. 1992). The Texas Supreme Court's opinion, judgment and order denying Petitioners' motion for rehearing are reprinted in Appendices A, B and C, respectively. The opinion of the Fourteenth Court of Appeals was reported in *Getty Oil Company and Texaco Inc. v. Insurance Company of North America, et al.*, 819 S.W.2d 908 (Tex. App.--Houston [14th Dist.] 1991), and is reprinted in Appendix D. The decision of the 280th District Court of Harris County, Texas is unpublished and is reprinted in Appendix E.

JURISDICTIONAL STATEMENT

The Texas Supreme Court initially issued its opinion on November 11, 1992, and denied Petitioners' Motion for Rehearing on March 3, 1993.

Pursuant to 28 U.S.C. § 2101 (c) and Supreme Court Rules 13.1, 13.4, Petitioners have applied for this writ of certiorari within ninety days after the Texas Supreme Court overruled Petitioners' motion for rehearing. Therefore, this Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AT ISSUE

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Texaco filed this lawsuit against NL Industries, Inc. ("NL") and its insurers, Insurance Company of North America and Youell and Companies, seeking to require them to pay the $14 million settlement of a wrongful death judgment rendered against "Getty Oil Corporation and Texaco, Inc." This lawsuit alleges the existence of a contract between Texaco's subsidiary Getty Oil Company and NL. A critical disputed issue was whether the alleged contract merely requires NL to carry insurance supporting its limited indemnity obligation or whether the insurance requirement is a separate obligation requiring NL to procure insurance covering the wrongful death claim.

The existence and interpretation of the alleged contract were the subject of a motion for partial summary judgment by Texaco, a motion for summary judgment by defendants, and a separate "mini-trial" in the trial court. No judgment was rendered at the conclusion of the mini-trial, but the trial court rendered a partial directed verdict that the purported contract lacked consideration. The trial court

denied Texaco's motion for partial summary judgment and granted defendants' motion for summary judgment.

Texaco appealed the grant of defendants' motion for summary judgment. Neither the denial of Texaco's motion for partial summary judgment nor the mini-trial ruling was at issue on appeal, nor could they have been under Texas procedure.[2] Texaco did not include defendants' responses to Texaco's motion for partial summary judgment in the appellate record, nor was any portion of the record from the mini-trial included in the record on appeal.[3]

The Texas Fourteenth Court of Appeals affirmed the summary judgment for defendants on *res judicata* grounds. The Texas Supreme Court affirmed again as to NL, but reversed the summary judgment as to Petitioners. Rather than limiting itself to a ruling that Petitioners failed to sustain their summary judgment burden, the Texas Supreme Court went on to hold: "[T]he additional insured provision of the contract does not support the indemnity agreement,

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[2] Texas procedure and case law are clear that denial of a motion for partial summary judgment is not appealable. *Rice v. English*, 742 S.W.2d 439, 444-46 (Tex. App.—Tyler, 1987, writ denied). NL objected when it appeared in the court of appeals that Texaco might be attempting to appeal the denial of its motion for partial summary judgment. In response, Texaco wrote: "NL says Getty and Texaco are appealing the denial of appellant's motion for summary judgment. . . . That is absurd." Consequently, it is beyond dispute that Texaco's motion for partial summary judgment was not before the appellate courts.

[3] Under Texas procedure, the burden is on the Appellant, Texaco, to see that a sufficient record is presented on appeal to show error requiring reversal. TEX. R. APP. P. 50(d).

but rather is a separate obligation. We disagree with the concurring and dissenting opinion that the contract is susceptible to any other reasonable interpretation." Thus, the Texas Supreme Court overstepped its bounds and effectively granted Texaco's motion for partial summary judgment.

The trial court's denial of Texaco's motion for partial summary judgment on that issue was *not* before the Texas Supreme Court. Petitioners' responses to Texaco's motion were *not* in the appellate record, Petitioners had *no* notice of the pendency of such motion and Petitioners had *no* opportunity to present arguments or evidence directed to that issue. The Texas Supreme Court thus had no possible way of determining whether viable defenses to Texaco's interpretation might exist. In fact, it has never been determined that a contract exists or that it applies to the underlying circumstances. Yet, summary judgment on this critical issue was granted for Texaco, *sua sponte*, by a judicial body that gave neither notice of its intention to consider Texaco's motion, nor an opportunity for Petitioners to be heard in opposition. The Texas Supreme Court's grant of summary judgment in favor of the non-moving party -- without any argument, evidence, or briefing in the record before it -- denied Petitioners the due process of law guaranteed by the United States Constitution.

Petitioners' constitutional rights were violated for the first time when the Texas Supreme Court issued its decision. Petitioners immediately moved for rehearing, challenging the grant of partial summary judgment in favor of the non-moving party upon appeal. *See* App. F. When violation of

a constitutional right to due process arises for the first time in a decision of a state supreme court, objection is timely made if raised on motion for rehearing. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). In Petitioners' motion for rehearing as supplemented, Petitioners properly objected to the lack of due process inherent in grant of summary judgment in favor the non-moving party. The Texas Supreme Court overruled the motion for rehearing without opinion.

The action of the Texas Supreme Court, if left unreviewed at this stage of the proceedings will, as a practical matter, permanently deprive Petitioners of a federal due process right. The trial court is bound by the ruling of the Texas Supreme Court as to the interpretation of the alleged contract, and must go forward on the issues remaining for trial on the unconstitutional premise of a partial summary judgment having been rendered against Petitioners without due process of law. The deprivation of Petitioners' due process rights will not "ripen" or develop by further trial proceedings in this matter; on the contrary, further proceedings below will only lend a permanence to the deprivation of due process, and the deprivation of due process will color all further trial proceedings and settlement negotiations in an insidious way. Practically viewed, failure to review this case at this stage would prevent any meaningful review.[4]

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[4] The requirement of finality should be given practical application, not a technical one. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949); *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1327 (1975).

ARGUMENT: Denial of Due Process

Petitioners' motion for summary judgment on the contract interpretation issue presented a narrowly-drawn argument that under Texas' "express negligence" rule, they should prevail on the bare language of the document at issue. *See Ethyl Corporation v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987). Petitioners' motion assumed, *arguendo*, that the document relied on by Texaco was a valid contract. It presented no extrinsic evidence as to the meaning of the document, and it accepted the language of the alleged contract in the light most favorable to Texaco, uncolored by course of performance, course of dealing, or usage of trade, and unencumbered by a multitude of related commercial documents. In fact, Petitioners chose not even to attempt to rebut Texaco's extrinsic evidence regarding the meaning of the alleged contract because, if the express negligence doctrine were applicable, such evidence would be neither relevant nor admissible.

The fact that those matters are not raised in Petitioners' motion for summary judgment does not mean that they do not exist. *See Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700, 703 (7th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956); *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). In the absence of the express negligence doctrine, they are highly relevant to the interpretation of the document relied upon by Texaco, particularly in light of the trial court's thus far unchallenged ruling that the alleged contract lacks consideration and is only applicable, if at all, as part of a larger course of

dealing.[5] *See* TEX. BUS. & COM. CODE ANN. §§ 2.202, 2.207, 2.208 (Vernon 1968). *See also Harbor Insurance Company v. Lewis*, 562 F. Supp. 800 (E.D. Pa. 1983). Since such evidence was not relevant to Petitioner's motion, it was not before the Texas Supreme Court.

In making its *sua sponte* ruling in favor of Texaco, the Texas Supreme Court must have presumed, wrongly, that Petitioners had no defenses to Texaco's prior motion, because its ruling has effectively precluded all of Petitioners' defenses on the contract interpretation issue, depriving Petitioners of any procedural opportunity ever to raise these defenses in any forum. Because the Texas Supreme Court is the court of last resort in Texas, review by this Court is Petitioners' only avenue for redress. The Texas Supreme Court's ruling has not merely deprived Petitioners of an opportunity to be heard on these defenses "at a meaningful time and in a meaningful manner;" it has deprived Petitioners of any opportunity to present these defenses at all -- and it has done so without even having before it the information necessary to evaluate the nature or merits of the defenses.

For example, if Petitioners were unable to establish that the express negligence rule mandated their interpretation of the alleged contract, they could have presented an alternative argument that the document was ambiguous and

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[5] This Court need not address the substance of these contract defenses. The proper inquiry for due process purposes is merely whether an adequate opportunity to present the defenses was afforded. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988).

that its interpretation was a jury issue. For obvious reasons, Petitioners presented no such argument in their motion for summary judgment. Yet, even without the benefit of those arguments and supporting evidence, three dissenters on the Texas Supreme Court found the document to be ambiguous, and its interpretation to be a question for the jury. More members of the court might have reached the same conclusion if Petitioners had the opportunity to present their evidence and arguments on that issue. The point is, Petitioners never had that opportunity.

There is a vast difference, procedurally and substantively, between a ruling that Petitioners failed to sustain their summary judgment burden as to the interpretation of the alleged contract and a ruling that Texaco's opposing interpretation is correct as a matter of law. A movant on summary judgment must establish the absence of material facts *in light of its proposed legal interpretations*; however, this is not the same as admitting the absence of material facts *if its proposed legal interpretations are rejected*. *Prepo*, 234 F.2d at 703; *Mingus*, 812 F.2d at 1391 ("[B]y the filing of a motion a party concedes that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted.") Petitioners' motion was not required, and did not purport, to present every defense to Texaco's interpretation of the alleged contract. Thus, it is no answer for Texaco to argue that Petitioners' own motion for summary judgment involved interpretation of the contract.

Just as a trial court cannot grant a *sua sponte* summary judgment without notice and an opportunity for the parties to present all of their defenses, neither may an appellate court, in reviewing a summary judgment for one party, grant summary judgment for the other non-moving party without due process and an opportunity to be heard. *Fountain v. Filson*, 336 U.S. 681, 682-83 (1949).[4]

The rule in *Fountain v. Filson* is firmly grounded in principles of due process. The 14th Amendment to the United States Constitution forbids the exercise of judicial power without notice to the defendant and an opportunity to be heard. *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). Notice and an opportunity to be heard are required "even if the facts are clear." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). And, of course, "the fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This is the reason a summary judgment proceeding requires "adequate procedural opportunity to oppose the motion." *White v. Texas American Bank/Galleria, N.A.*, 958 F.2d 80, 82-85 (5th Cir. 1992). *Accord Powell v. U.S.*, 849 F.2d 1576, 1579-82

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[4] *See* 10A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2720, at 34 (1983) ("[A]n appellate court should not reverse a summary judgment and order judgment for the nonmoving party on the basis of an issue that the movant had no opportunity to meet in the district court."); *and* 6 MOORE'S FEDERAL PRACTICE ¶ 56.12, at 156-169 (1992) ("[T]he appellate court should not order summary judgment for the non-moving party, but should remand for further development of the case, which may include the making of a motion for summary judgment by the prior non-moving party who prevailed on the appeal.")

(5th Cir. 1988) ("[T]he . . . court must give proper notice to insure that the nonmoving party had the opportunity to make every possible factual and legal argument"); *Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 652 (5th Cir. 1986) (purpose of summary judgment notice requirement is to afford a "reasonable and meaningful opportunity" to be heard); *Winbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219, 223 (2d Cir. 1980) (party must be afforded the "due process protection specified in" the summary judgment rule).

The Court of Appeals for the Fifth Circuit has recognized that appellate courts sometimes err by going "too fast in making findings against" movants, thereby depriving movants of the necessary notice of possible findings against them. *Landry v. Air Line Pilots Association International AFL-CIO*, 901 F.2d 404, 437-38 (5th Cir. 1990), *cert. denied* 498 U.S. 895 (1990) (modification of opinion on motion for rehearing). In such a circumstance, the overreaching opinion should be limited by modification upon motion for rehearing. *Id.* The Texas Supreme Court did not take the opportunity on rehearing to modify its opinion, thereby finalizing the violation of Petitioners' due process rights.

Minimum federal constitutional standards must be observed under state practice rules. Indeed, in analyzing this case, this Court will note that the Texas Supreme Court has even violated its own rules of practice by granting summary judgment for the non-moving party.[7] Texaco *could*

[7] The propriety of the Texas Supreme Court's grant of summary judgment should be held to closer scrutiny than grant of a summary judgment in federal court. Texas law sets a higher standard for grant of

not have appealed the denial of its motion for partial summary judgment on the contract interpretation issue. *Rice v. English*, 742 S.W.2d at 444-46. It would be truly anomalous for Texaco to receive from the Texas Supreme Court, *sua sponte*, what it could not have received by expressly attempting to appeal the trial court's denial of its motion for summary judgment.

Petitioners' situation is reminiscent of, but worse than, the deprivation held to violate the 14th Amendment's guarantee of due process in *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965). There, Armstrong was given the opportunity to present his defenses, but under circumstances which relieved the opposing party of its burden of proof and shifted the burden to Armstrong. This Court held that the shifting of the burden from what it would have been at trial violated Armstrong's right to due process. Similarly, here, the Texas Supreme Court has unacceptably altered the burdens of proof. Texaco would have had the burden of proving its case at trial against whatever defenses the Petitioners might have interposed. If neither side offered evidence, Texaco would not prevail, having failed in its burden. The Texas Supreme Court's ruling in Texaco's favor completely relieved Texaco of its burden to overcome those defenses, not merely by shifting the burden to Petitioners as in *Armstrong v. Manzo*, but by totally depriving Petitioners of any opportunity even to raise those defenses.

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summary judgment in its courts than does federal law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex. 1988).

It also makes no difference to Petitioners' due process rights whether the defenses Petitioners may raise are ultimately held to be meritorious. At this stage, a substantive inquiry into the merits of Petitioners' defenses is not appropriate. *Procedural* due process is the paramount concern. In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988), this Court held that a judgment rendered without constitutionally-mandated notice and an opportunity to be heard may not be permitted to stand and that consideration of the merits of any potential defenses was not a relevant inquiry. It makes no difference if the same judgment would be rendered on remand. It is the denial of the opportunity to be heard which constitutes the due process violation. *Id.* at 86-87.

CONCLUSION

In ruling without notice on the complex subject matter of a motion for summary judgment previously denied, and never appealed, and on which there was incomplete information in the record on appeal, the Texas Supreme Court violated mandatory procedural safeguards which resulted in Petitioners being deprived of any opportunity to present all their defenses to plaintiff's position. By so depriving Petitioners, the Texas Supreme Court has violated Petitioners' right to due process under the 14th Amendment of the United States Constitution. Accordingly, Petitioners

request that this Court grant a writ of certiorari to review the judgment of the Texas Supreme Court.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. D-1937

GETTY OIL COMPANY AND
TEXACO INC., PETITIONERS

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND YOUELL
AND COMPANIES, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

OPINION

The purchaser of certain chemicals brought suit against the seller and its insurers, claiming that they were

contractually obligated to provide insurance to cover a judgment against the purchaser in a wrongful death action precipitated by the explosion of the chemicals. The trial court granted summary judgment for the defendants on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, TEX. REV. CIV. STAT. ANN. art. 2212b (now codified and amended at TEX. CIV. PRAC. & REM. CODE §§ 127.001-.007 (Vernon 1986 & Supp. 1992)); (2) the same contractual provision violated the common law express negligence rule; (3) the prior litigation of a related indemnity provision precluded the present suit under the doctrine of res judicata; and (4) specific issues were precluded by collateral estoppel. The court of appeals affirmed on the theory of res judicata. 819 S.W.2d 908. We affirm the judgment of the court of appeals in part, reverse in part, and remand the cause to the trial court for further proceedings.

I. *Facts and Procedural Background*

Getty Oil Company ("Getty") purchased various chemicals from NL Industries, Inc. ("NL") for Getty's oil production and exploration operations in the Midland, Texas, area. A purchase order numbered "HB-5357" was in effect from August 1, 1983, to July 31, 1984. It included the following provisions:

> 4. INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully

performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:

WORKMEN'S COMPENSATION	STATUTORY
EMPLOYERS' LIABILITY	$500,000
GENERAL LIABILITY:	
BODILY INJURY	500,000

. . .

AUTOMOBILE LIABILITY:	
BODILY INJURY	500,000

. . .

All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser. . . to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser. . .

Seller shall indemnify, defend and hold harmless Purchaser. . . from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages resulting from injury to any person (including injury resulting in death), or damage (including loss or destruction to property of whatsoever nature

> of any person) arising out of or incident to the performance of the terms of this Order by Seller (including, but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order.) Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.
>
> The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

On November 22, 1983, a barrel of chemical demulsifier delivered by NL under Order No. HB-5357 exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty.

Duncan's estate and survivors brought wrongful death and survival actions in the 130th Judicial Court of Matagorda County against Getty, NL and its subsidiaries, and others.[1] Getty filed a cross-claim against NL, alleging

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[1] In 1984, Texaco, Inc. acquired Getty. Accordingly, Texaco was joined as a party defendant. The plaintiffs also acted against Rimes Well

(continued...)

that NL's negligence proximately caused the injury to Duncan, that the chemicals manufactured by NL were defective, and that NL breached warranties in connection with the sale of the chemicals. Getty also asserted a contractual right of indemnity against NL under the terms of HB-5357 (quoted above), and a contribution claim because of NL's negligence. The jury found Getty 100% negligent and grossly negligent in causing the accident. The trial court rendered judgment on the jury verdict for $3,757,000 actual damages and $25,000,000 punitive damages. The trial court also rendered judgment that "all Cross-Actions for contributions and/or indemnity based upon the contracts are denied." Getty appealed the portion of the judgment denying it contribution and indemnity, and the court of appeals affirmed the judgment of the trial court. *Getty Oil Corp. v. Duncan*, 721 S.W. 2d 475 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). Getty's insurers, Travellers Insurance Company, Travellers Indemnity Company, and English & American Insurance Company, settled the claim for $14 million.

Getty then filed an insurance claim with NL's insurers. After they refused to honor the claim, Getty sued NL and its primary and excess insurance carriers, Insurance Company of North America ("INA") and Youell and Companies[2] ("Youell"), respectively.[3] Getty alleged that,

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[1](...continued)
Service, a company that had been doing work at the accident site, and Tony Roa, one of its employees.

[2] Youell & Cos. is a consortium of offshore insurance companies and Lloyds syndicates.

pursuant to the terms of the HB-5357 "Insurance and Indemnity" provision, NL's insurance should cover Getty for its liability in the *Duncan* case. Getty brought claims against NL for breach of the contract to purchase insurance in its behalf, violation of TEX. BUS. & COM. CODE § 1.203 (Tex. UCC) (Vernon 1968) (obligation of good faith), breach of the duty of good faith and fair dealing, negligence, violation of the Texas Deceptive Trade Practices Act ("DTPA"), TEX. BUS. & COM. CODE §§ 17.41-63 (Vernon 1987 & Supp. 1992), and common law fraud. Against INA and Youell, Getty asserted claims for breach of the contract to extend its insurance coverage, violation of TEX. INS. CODE art. 3.62 (Vernon 1981) (repealed) (failure to pay claim), breach of the duty of good faith and fair dealing, negligence, violation of the DTPA, and common law fraud.

NL, INA and Youell jointly moved for summary judgment, arguing that (1) the terms of HB-5357 did not make Getty an additional insured under NL's policies; (2) the Insurance and Indemnity scheme of HB-5357 was prohibited by the Texas Oilfield Anti-Indemnity Statute, TEX. REV. CIV. STAT. ANN. art. 2212b (now codified and amended at TEX. CIV. PRAC. & REM. CODE §§ 127.001-007); and

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[3](...continued)

[3] Getty originally filed suit in the 10th District Court in Galveston County. The defendants removed to the United States District Court for the Southern District of Texas. The federal court held that Getty's claims were barred by res judicata, but the United States Court of Appeals for the Fifth Circuit vacated the judgment, holding that complete diversity of citizenship was lacking. *Getty Oil Corp., a Div. of Texaco v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1988). The case was remanded to state court in Galveston County, and then transferred by agreement to Harris County, where it was assigned to the 280th District Court.

3) Getty's claims were barred by res judicata and collateral estoppel. The defendants also joined Getty's insurers as third party defendants, claiming that Getty's policies with them at least partially relieved the defendants of covering Getty's liability.

On May 3, 1990, the trial court granted the defendants' motions for summary judgment. The trial court also granted the defendants' motion to sever the third party claims against Getty's insurers, and ordered that the severed actions not go forward until resolution of the action between Getty and the defendants. Getty appealed the summary judgment for defendants, and the court of appeals affirmed on res judicata grounds, holding that Getty's claims were barred because it was seeking the same relief under a different theory that it unsuccessfully sought in the first suit. 819 S.W.2d at 915. Getty now seeks a reversal of the court of appeals' judgment and the trial court's summary judgment.[4]

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[4] Three amici curiae have submitted briefs in support of Getty's position: Texas Mid-Continent Oil and Gas Association, Shell Oil Company, and Amerada Hess Corporation. Three amici curiae have also submitted briefs in support of the Respondents' position: the International Association of Drilling Contractors (IADC); the Associated General Contractors of Texas (AGC), and the Association of Oilwell Servicing Contractors (AOSC).

II. *Res Judicata*

A. *Getty v. NL*

We recently clarified that Texas follows the "transactional" approach to res judicata. *See Barr v. Resolution Trust Corp.*, _____ S.W.2d _____ (Tex. 1992). Under this approach, a judgment in an earlier suit "precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." *Id.* at _____; *Texas Water Rights Comm. v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979).

We conclude that Getty's present suit arises out of the same subject matter as its earlier cross-claim against NL asserted in the *Duncan* suit. The RESTATEMENT (SECOND) OF JUDGMENTS, which recognizes the transactional test, suggests that factors to consider in determining whether facts constitute a single "transaction" are "their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1980). Getty's present action against NL arose from the same accident that was adjudicated in the *Duncan* suit. The present suit also concerns the same contract, HB-5357, and the same section of that contract, the "Insurance and Indemnity" section. Finally, Getty seeks the same relief against NL here as in its earlier cross-claim: reimbursement for Getty's liability to Duncan's estate and beneficiaries. Thus,

both Getty's actions against NL derived from the same transaction.[5]

Getty argues that res judicata cannot bar its present claims against NL because these claims did not accrue until judgment was rendered in the *Duncan* suit. That is, Getty had no liability and hence no need for insurance coverage until liability was assigned. The contingent nature of these claims, however, does not preclude the operation of res judicata. We held in *Barr* that "[a] subsequent suit will be barred if it arises out of the same subject matter of a pervious suit and which, through the exercise of diligence,

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[5] This conclusion comports with a recent Fifth Circuit decision involving nearly identical facts. *Ocean Drilling and Exploration Co. v. Mont Boat Rental Service*, 799 F.2d 213 (5th Cir. 1986). In that case, Mont had contractually agreed to indemnify ODECO and to purchase liability insurance that would name ODECO as an additional insured. In 1978, an ODECO employee was injured and sued both ODECO and Mont. ODECO brought a cross-claim against Mont, asserting contribution and indemnity. The trial court rendered judgment of $340,000 solely against ODECO, found Mont not liable, and rendered judgment against ODECO on its claims against Mont. ODECO then brought a second suit against Mont under the additional insured provision. The trial court held that the action was barred by res judicata. The Fifth Circuit affirmed, holding as follows:

> Although the tort-indemnity theory that ODECO asserted in [the former case] differs from the contractual liability theory it now presses, the right ODECO seeks to redress is the same reimbursement for obligations it incurred as a result of the [prior] litigation. . . . Because ODECO's cause of action for tort indemnity is based on substantially the same facts as its claim for contractual indemnity, res judicata bars the belated assertion.

799 F.2d at 217.

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could have been litigated in a prior suit." _____ S.W.2d at _____. Getty could have asserted its present claims in the *Duncan* suit, with their resolution being contingent on the plaintiffs' claims. Texas Rule of Civil Procedure 51(b) provides:

> Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

See Parkhill Produce Co. v. Pecos Valley Southern Ry. Co., 348 S.W.2d 208 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.). For example, we have held that an indemnitee may bring a claim against an indemnitor before judgment is assigned against the indemnitee. *See Gulf, Colorado & Santa Fe Ry. Co. v. McBride*, 159 Tex. 442, 446, 322 S.W.2d 492, 495 (Tex. 1958); *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 431, 303 S.W.2d 775, 779 (Tex. 1957); *K&S Oil Well Service, Inc. v. Cabot Corp.*, 491 S.W.2d 733, 739 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). Forcing the indemnity suit to wait for judgment in the liability suit "would contravene the policy of the courts to encourage settlements and to minimize litigation." *Id.*

Getty itself took advantage of this rule in its initial cross-action against NL, in which Getty asserted its claim under the indemnity provision of HB-5357. The fact that Getty had no claim for indemnity against NL until the trial

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court rendered judgment did not preclude this cross-claim. Likewise, Getty could have brought its other contingent cross-claims against NL in the *Duncan* action. The fact that Getty's claims against NL were contingent on Getty incurring liability in the *Duncan* suit does not in and of itself preclude operation of res judicata.[6]

We do not hold that a defendant must assert a cross-claim against a co-defendant simply because it arises from the same subject matter as plaintiff's claim. TEX. R. CIV. P. 97(e) clearly makes such a cross-claim permissive: the defendant may assert it, but is not required to. Rule 97(e) comports with the principle that res judicata applies only to *adverse* parties. Where two parties are aligned in the first action and no issues are drawn between them, the judgment in that action does not preclude later claims between those parties. *See Smith v. Baker*, 380 S.W.2d 725, 726 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.); *Green v. City of San Antonio*, 282 S.W.2d 769, 776 (Tex. Civ. App.—San Antonio

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[6] If Getty believed that trying all of these claims in the same action would have been prejudicial, it could have moved the trial court to bifurcate the trial under TEX. R. CIV. P. 174(b), which provides: "in furtherance of convenience or to avoid prejudice [the court] may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Also, if for any reason Getty could not have obtained a just adjudication of its claim against NL under the additional insured provision without the presence of NL's insurers, which, as discussed in the next section could not have been joined in the *Duncan* suit, then the trial court could have severed this claim and stayed it until after judgment was rendered on the primary claims.

1955, writ ref'd n.r.e.; *Second Nat'l Bank of Houston v. Fuqua*, 262 S.W.2d 834, 835 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.). However, where a defendant *does* assert a cross-claim against a co-party, they become adverse, and the principles of res judicata apply. The cross-claimant becomes a plaintiff for res judicata purposes, and is required to assert all claims against the cross-defendant arising from the subject matter of the original cross-claim. *Cf.* RESTATEMENT (SECOND) JUDGMENTS § 23 (1980) ("Where a defendant interposes a claim as a counterclaim and a valid and final judgment is rendered against him on the counterclaim, the rules of bar are applicable to the judgment.").

Getty relies on *Chandler v. Cashaway Building Materials, Inc.*, 584 S.W.2d 950, 954 (Tex. App.—El Paso 1979, no writ), where the court held that res judicata "applies to the cause of action which was actually filed by the plaintiff and not cross-actions which might have been filed by a defendant, unless, of course, the compulsory counterclaim rule is applicable." *See also Swiss Avenue Bank v. Silvka*, 724 S.W.2d 394, 396-97 (Tex. App.—Dallas 1986, no writ). These cases merely reiterate the principle of Rule 97(e) that a party is not required to assert a cross-claims against an otherwise non-adverse party. Neither *Chandler* nor *Silvka* involved a situation where a party asserted some, but not all of its cross-claims.

Getty was not required to bring any of its cross-claims against NL in the *Duncan* suit. Once it chose to bring some of those claims, however, it was required under res judicata to bring them all in the same action.

Accordingly, we agree with the court of appeals' holding as to this issue.

B. *Getty v. INA and Youell*

The court of appeals also held that Getty's claims against INA and Youell, NL's primary and excess insurance carriers, were barred by res judicata. Although INA and Youell were not parties to the *Duncan* suit, the court reasoned that res judicata bars a second suit "against the same parties *or their privies*." 819 S.W.2d at 910 (emphasis added).

Under Texas law, a former judgment bars a second suit against all who were in "privity" with the parties to the first suit. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). There is no general definition of privity than can be automatically applied in all res judicata cases; the circumstances of each case must be examined. *See Dairyland County Mutual Ins. Co. of Texas v. Childress*, 650 S.W.2d 770, 773-74 (Tex. 1983); *Benson*, 468 S.W.2d at 363. Those in privity with a party may include persons who exert control over the action, persons whose interests are represented by the party, or successors in interest to the party. *See Dairyland*, 650 S.W.2d at 774.

Getty replies that even if INA and Youell were in privity with NL, res judicata would not bar Getty's present claims against them because Getty could not have asserted those claims in the *Duncan* suit. The insurance policies themselves specifically prohibited any claim from being brought against INA or Youell before the insured's liability

was reduced to judgment or compromised.[7] We have held that when such "no action" policy provisions exist, "a third party's right of action against the insurer does not arise until he has secured such an agreement or a judgment against the insured." *Great American Ins. Co. v. Murray*, 437 S.W.2d 264, 265-66 (Tex. 1969); *see also State Farm County Mut. Ins. Co. of Texas v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989).

Moreover, TEX. R. CIV. P. 38(c) prohibited Getty from joining INA and Youell in the *Duncan* suit. This rule provides, with respect to the joinder of third parties:

> (c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability

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[7] The INA General Insurance Policy contained the following condition:

> 5. Action Against Company
> No action shall lie against the Company unless. . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

The Youell policy contained the following condition:

> J. LOSS PAYABLE
> . . .
> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under this policy within twelve (12) months after. . . the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters.

> or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

Rule 38(c) has been held to prohibit the joinder of insurers in situations resembling this case. *See Langdeau v. Pittman*, 337 S.W.2d 343, 355 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).

Since Getty could not have asserted its present claims against INA or Youell in the *Duncan* suit,[8] it is not now precluded by res judicata from bringing these claims. We accordingly reverse the judgment of the court of appeals affirming the trial court's summary judgment against INA and Youell on the ground of res judicata, and we remand

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[8] This result comports with the RESTATEMENT (SECOND) OF JUDGMENTS § 51 (1980):

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other [NL and its insurers], and an action is brought by the injured person against one of them [Getty's cross-claim], the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.
>
> (1) A judgment against the injured person [Getty] that bars him from reasserting his claim against the defendant in the first action [NL] extinguishes any claim he has against the other person [the insurers] responsible for the conduct unless:
>
> (a) The claim asserted in the second action is based upon grounds that could not have been asserted [payment under the policy] against the defendant in the first action. . . .

this portion of the cause to the trial court for further proceedings.

III. *Collateral Estoppel*

The trial court also granted summary judgment for respondents on the basis of collateral estoppel. The court of appeals did not reach this question.

The doctrine of collateral estoppel precludes relitigation of ultimate issues of fact actually litigated and essential to the judgment in a prior suit. *Tarter v. Metropolitan Savings & Loan Ass'n*, 744 S.W.2d 926, 927 (Tex. 1988) *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). NL first argues that Getty seeks to relitigate the issue of whether Duncan's accident arose in connection with NL's performance of the purchase order. This issue is important because HB-5357 requires NL to provide insurance for Getty only for losses "arising out of or incident to the performance of the terms of this Order by

[NL]. . . ."[9] NL contends that the jury decided this issue adversely to Getty in the *Duncan* case.

Collateral estoppel requires that the issue decided in the first action be identical to the issue in the pending action. *See Price v. Texas Employers' Ins. Ass'n*, 782 S.W.2d 938, 940 (Tex. App.—Tyler 1989, writ ref'd n.r.e.). The jury in the *Duncan* suit found that NL was not negligent and that it placed adequate warnings on the chemicals, but neither the jury nor the trial court expressly found that the accident did not arise out of or incident to NL's performance of the purchase order. NL contends, however, that the phrase "incident to [NL's] performance" in HB-5357 refers only to losses caused by NL's negligence, and thus the jury's answers necessarily equate to a finding that Duncan's accident was not incident to the performance of HB-5357. The court in the *Duncan* case, however, apparently made no finding regarding this question. Also, we do not consider the language necessarily to be as narrow as NL contends.

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[9] This limitation expressly appears in the indemnity section of HB-5357, but not in the insurance section. Getty does not contend, however, that NL's obligation to provide insurance extends to risks beyond those associated with performance of the purchase order. Getty pled as follows in its Fourth Amended Petition:

> Pursuant to [HB-5357], NL was contractually obligated to obtain and maintain, at NL's cost, liability insurance to protect Getty from liability for personal injuries occurring in connection with the performance of the NL-Getty contract.

Getty likewise acknowledges in its reply brief to this Court that it must prove "the sale by NL under the contract of the product involved in the Duncan accident."

Getty's construction -- that an injury is "incident to performance" as long as it results from chemicals delivered by NL under the contract -- is also arguable under the literal language of the agreement. The parties have not focused on the proper interpretation of this language in their briefing and argument to this Court,[10] and thus we are unable under the present record to conclude that NL's obligation to provide insurance applied only for accidents caused by NL's negligence. Without such a finding, we cannot conclude that Getty is attempting to relitigate a factual issue decided by the jury in the *Duncan* case, and NL's collateral estoppel argument must therefore fail.

NL further argues that Getty is attempting to relitigate a legal issue previously decided in the *Duncan* suit: whether Getty has a right of indemnity from NL. Collateral estoppel also precludes the relitigation of essential issues of law that were litigated and determined in a prior action. *Price*, 782 S.W.2d at 940-41; *Withers v. Republic Nat'l Bank of Dallas*, 248 S.W.2d 271, 282 (Tex. Civ. App—Beaumont 1952, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). It was determined in the *Duncan*

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[10] NL does cite *Joe Adams & Sons v. McCann Construction Co.*, 475 S.W.2d (Tex. 1971), where the Court held that an indemnity agreement requiring a subcontractor to indemnify the general contractor for injuries sustained "through or on account of any act or in connection with the work of the [subcontractor]" did not apply to injuries caused solely by the general contractor's negligence, even though an act of the subcontractor was a contributing cause-in-fact. The holding, however, was based on the express negligence doctrine. As discussed in Section V, *supra*, this doctrine has been held to apply only to indemnity provisions, not to insurance-shifting provisions, and thus *McCann* is not helpful in interpreting the additional insured provision of HB-5357.

suit that Getty had no right of indemnity from NL, but Getty is not attempting to relitigate that issue here. Rather, it is seeking damages for NL's failure to extend insurance coverage to Getty. Although the latter action arose from the same transaction as the former and, with respect to Getty's claim against NL, is barred by res judicata, it is based on a different provision of HB-5357 and does not present the same legal issue. As indicated, collateral estoppel only applies where the *identical* issue was litigated in the prior suit. *Price*, 782 S.W.2d at 940.

For the foregoing reasons, the court of appeals' judgment cannot be affirmed on the basis of collateral estoppel.

IV. *Anti-Indemnity Statute*

The Texas Oilfield Anti-Indemnity Statute, TEX. REV. CIV. STAT. ANN. art. 2212b (now codified and amended at TEX. CIV. PRAC. REM. CODE §§ 127.001-007), provides that an agreement pertaining to an oil or gas well is void if it purports to indemnify a party from loss or liability for damage arising out of its own negligence.[11] Prior

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[11] Section 2 of Article 2212b provides:

> [A] covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or mine for any mineral, is void and unenforceable if it purports to indemnify the indemnitee [Getty] against loss or liability for damages arising from either death or bodily injury to persons, or injury to property, or any other loss, damage, or expense arising from either death or bodily injury,

(continued...)

to the enactment of Article 2212b in 1973, many oil companies and oil well operators had "hold harmless" agreements with oil well drilling and service contractors. These agreements generally required the contractors to indemnify the operators for losses caused by the negligence of the contractor, and often for the negligence of the operator and third parties as well. Many believed that such agreements placed an undue financial burden on what were perceived to be small contractors with less bargaining power than the operators with whom they were negotiating contracts. *See* HOUSE INTERIM STUDY COMMITTEE ON HOLD HARMLESS AGREEMENTS, REPORT, 63rd Leg. at 3-8 (1973) [hereinafter HOUSE STUDY COMMITTEE]. In 1973, the legislature attempted to cure this perceived inequity by enacting Article 2212b, which prohibits agreements that indemnify a party for its own negligence.

The court of appeals held that under the statute, the "additional insured" provision of HB-5357 is facially invalid because it makes NL indemnify Getty for Getty's own negligence.[12] It reasoned:

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[11](...continued)

> injury to property, or loss, damage, or expense, which is caused by or results from the sole or concurrent negligence of the indemnitee [Getty], or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

[12] This case does not present the question whether the indemnity provision of HB-5357 is void under the terms of the Anti-Indemnity Statute, and we express no opinion on this issue.

> [T]he effect of upholding [the provision] would be to allow Getty to avoid liability for its sole negligence. This result... contravene[s] the statutory goal of prohibiting agreements allowing a party to avoid responsibility for the results of its own negligence.

819 S.W.2d at 914.

Getty argues that the court of appeals erred because the provision at issue is an "additional insured" provision, and the Anti-Indemnity Statute only applies to indemnity provisions, which are different. Prohibited indemnity provisions make the indemnitor (NL) liable for the indemnitee's (Getty's) negligence. Additional insured provisions, on the other hand, make the insurance-purchaser's insurers (INA and Youell) liable for the loss caused by the insured's (Getty's) negligence. The insurance-purchaser is responsible only for paying the insurance premiums, presumably far less than the actual loss. Moreover, the cost of premiums is certain and exact. Thus, contractors are still protected by the Anti-Indemnity Statute from large and uncertain liabilities caused by an indemnitee's negligence.

Respondents argue that recognizing a distinction between the indemnity and insurance provisions would allow Getty to accomplish indirectly what it otherwise could not achieve directly avoiding liability for its own negligence. Section 5 of the Anti-Indemnity Statute specifically provides:

> Each party to an agreement defined in Section 3 of this Act shall be responsible for

> the results of his own actions and for the actions of those persons over whom he exercises control.

They contend that if the additional insured provision of this contract is not rendered unenforceable, Getty will be able to evade responsibility for its actions, in contravention of this statutory command.[13]

NL, in particular, argues that under § 4(c) of article 2212b, the burden of procuring insurance may be shifted only when the insurance supports an obligation to provide indemnity against claims for injury to the contractor's own employees. Because Duncan was an independent contractor working for Getty, and not an NL employee or contractor, this limited exception does not authorize the "insurance shifting" scheme of the contract.

We conclude that section 5 of article 2212b simply states the policy behind the prohibition of indemnity agreements, and does not have substantive effect. Section 5, if interpreted as broadly as respondents urge, would prohibit a party from obtaining its own liability insurance, clearly not the intent of the statute.

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[13] Amicus Curiae International Association of Drilling Contractors, aligned with Respondents, further argues that if a contractor is required to purchase insurance covering the negligence of an operator and third parties, it will be forced to bear significant costs in the form of dramatically increased insurance premiums or, if insurance becomes unavailable, the necessity to self-insure, and increased safety risks resulting from the operator's freedom to act negligently.

We further conclude that the language of article 2212b applies exclusively to indemnity agreements. Section 4(c) does not prohibit "insurance shifting" schemes that do not fall within its parameters; rather it *permits* certain indemnity agreements if they are supported by liability insurance and meet the section's other requirements. Art. 2212b, § 4(c) (now codified and amended at TEX. CIV. PRAC. & REM. CODE § 127.005). The Anti-Indemnity statute does not purport to regulate any agreements for the purchase of insurance unless they are in support of indemnity agreements.

Respondents argue that the additional insured provision of HB-5357 does support the indemnity agreement which follows it. They cite *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823 (Tex. 1972), in which we reasoned that the liability insurance provision of a contract should be construed as assuring performance of an indemnity agreement also contained in the contract.

While we express no opinion as to whether Getty is an additional insured under NL's insurance policies, we agree with the court of appeals that the contract in the instant case is significantly different from that in *Fireman's Fund*. *See* 819 S.W.2d at 912. The indemnity provision in paragraphs 3-4 of HB-5357 is supported by an insurance provision separate from an additional to the additional insured provision in paragraphs 1-2. The last sentence of paragraph 3 provides that "[i]nsurance covering this indem-

nity agreement shall be provided by Seller."[14] This provision, not the first sentence of paragraph 2, which begins "All insurance coverage carried by Seller. . . shall extend to and protect Purchaser," supports the indemnity agreement. Moreover, the additional insured provision requires that NL extend insurance coverage to Getty "whether or not required [by the other provisions of the contract]." Thus, the additional insured provision of the contract does not support the indemnity agreement, but rather is a separate obligation. We disagree with the concurring and dissenting opinion that the contract is susceptible to any other reasonable interpretation. The additional insured provision, which does not support an indemnity agreement, is not prohibited by the language of the Anti-Indemnity Statute.

Respondents also argue that the three other states having oilfield anti-indemnity statutes have not permitted insurance-purchasing agreements like the one in this case.[15] *See Babineaux v. McBroom Rig Bldg. Svc., Inc.*, 806 F.2d 1282, 1284 (5th Cir. 1987) (applying Louisiana law);

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[14] As indicated, we express no opinion on the validity of the indemnity agreement of HB-5357, including this supporting insurance requirement.

[15] Only Texas, Louisiana, New Mexico and Wyoming have anti-indemnity statutes directed particularly at oil and gas operations. *See generally* Battiato & Gilbertson, THE CHANGING INSURANCE MARKET - WHO WILL BEAR THE RISK?, 32 ROCKY MTN. MIN. L. INST. § 17.04 at 17-16 (1986); Owen L. Anderson, THE ANATOMY OF AN OIL AND GAS DRILLING CONTRACT, 25 Tulsa L.J. 359, 421-431 (1990).

Other oil and gas producing states, such as Alaska, Arizona, California and South Dakota, have anti-indemnity statutes that target construction contracts. Battiato & Gilbertson, *supra*, at 15-16.

Nesom v. Chevron U.S.A., Inc., 633 F. Supp. 55, 59 (E.D. La. 1984); *Amoco Prod. Co. v. Action Well Serv., Inc.*, 755 P.2d 52, 55 (N.M. 1988); *Murray v. Trunkline Gas Co.*, 544 So. 2d 28, 32, (La. Ct. App. 1989). *Cf. Mountain Fuel Supply Co. v. Everson*, 578 P.2d 1351, 1354 (Wyo. 1978) (validity of insurance provision not reached, but court expressed doubt that such a provision would be valid).[16] Respondents urge that we follow these jurisdictions, particularly New Mexico, whose oilfield and anti-indemnity statute influenced the

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[16] Getty cites no oilfield anti-indemnity statute cases to counter Respondents' position. Getty does, however, not that courts interpreting other types of anti-indemnity statutes have differentiated between indemnity and additional insured provisions. *See, e.g., Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174, 1177 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053, 105 S. Ct. 1757, 84 L. Ed. 2d 820 (1985) (Longshoremen's and Harbor Workers' Compensation Act § 5(b), 33 U.S.C.A. § 905(b) (1976); *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283, 556 N.E.2d 1090 (1990) (N.Y. Gen. Oblig. Law § 5-322.1 (McKinney 1989) (construction anti-indemnity)); *Bosio v. Branigar Organization, Inc.*, 154 Ill. App. 3d 611, 107 Ill. Dec. 105, 506 N.E.2d 996 (Ill. App. Ct. 1987) (Ill. Rev. Stat. ch. 29, pars. 61 (1985) (construction)); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So. 2d 851, 855-56 (Fla. Dist. Ct. App. 1984) (Fla. Stat. ch. 725.06 (1977) (construction anti-indemnity)).

We do not believe that the maritime and construction anti-indemnity statutes discussed in these cases are helpful in interpreting our oilfield and anti-indemnity statute. The policies behind these foreign statutes do not reflect the concerns of the oil industry in Texas. For example, the Illinois construction anti-indemnity statue, Ill. Rev. Stat. ch. 29, pars. 61 (1985), was enacted "to protect the construction worker and the general public from suffering construction-related injuries." *Bosio*, 506 N.E.2d at 998. This policy goal clearly differs from the goal of the Texas oilfield act, which was enacted to protect *contractors* from inequitable indemnification provisions. Tex. Rev. Civ. Stat. art. 2212b § 1 (now codified and amended at Tex. Civ. Prac. & Rem. Code § 127.002)).

passage of the Texas statute. *See* HOUSE STUDY COMMITTEE, *supra*, at i. 7.

These cases, however, are not dispositive of the case before us. In *Amoco*, the insurance provision in dispute was directly in support of a prohibited indemnity agreement. 755 P.2d at 53. As discussed, the additional insured provision of HB-5357 is a separate covenant and does not support an indemnity agreement.[17]

The Louisiana cases are distinguishable because that state's Anti-Indemnity statute expressly prohibits additional insured clauses that shift the burden of insurance. LA. REV. STAT. ANN. § 9:2780(G) (West 1986). *See also Babineaux*, 806 F.2d at 1284 n.2; Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 Tulsa L.J. 359, 424 (1990). Thus, the Louisiana statute is broader than the Texas statute, which only prohibits certain indemnity agreements. TEX. REV. CIV. STAT. art. 2212b § 2 (now codified and amended at TEX. CIV. PRAC. & REM. CODE § 127.003); *see also* John M. Battiato & Joel W. Gilbertson, *The Changing Insurance Market - Who Will Bear the Risks?*, 32 ROCKY MTN. MIN. L. INST. § 17.04 at 17-18 (1986). If our legislature desired to expand the Texas Anti-Indemnity Act to the breadth of the Louisiana statute, it could have done so. Because it did not, this Court should not interpret the statutory language to include such a restriction.

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[17] The basis for the Wyoming Supreme Court's dicta in *Mountain Fuel* is unclear because the insurance contract was not made part of the record in that case. 578 P.2d at 1354.

Respondents argue that the practical effect of the additional insured provision in HB-5357 is to indemnify Getty by relieving it of responsibility for its sole negligence, and that it thus violates the intentions of the Anti-Indemnity statute. While we do not deny the effect of insurance coverage, we decline to expand the language of our Anti-Indemnity statute to encompass insurance procurement provisions that are not actually indemnity agreements and that do not directly support indemnity agreements. Rather, we construe the language of the statute strictly to permit parties to contract freely with regard to agreements not covered by the statutory language. Thus, the additional insured provision of HB-5357 is not covered by the Anti-Indemnity statute.

V.

EXPRESS NEGLIGENCE DOCTRINE

The trial court rendered summary judgment for respondents on the ground that the express negligence doctrine invalidates the additional insured provision of HB-5357. This common law doctrine, as stated in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (1987), provides that:

> [P]arties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms . . . within the four corners of the contract.

Although the court of appeals recognized that the express negligence doctrine has been applied only to "contractual indemnity provisions," it reasoned as follows:

> Texas courts would undoubtedly extend this limitation to insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence.

819 S.W.2d at 914. As discussed above, however, the additional insured provision of HB-5357 does not support an indemnity agreement. As amicus curiae Texas Mid-Continent Oil and Gas Association points out, the express negligence doctrine in Texas has been applied only to indemnity provisions, not insurance-shifting provisions. *See Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989); *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987) (per curiam); *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987) (per curiam); *Whitson v. Goodbodys, Inc.*, 773 S.W.2d 381 (Tex. App.—Dallas 1989, writ denied).

We decline to extend the express negligence doctrine to contractual provisions other than indemnity agreements in this case, and we thus hold that this doctrine does not invalidate the additional insured provision of HB-5357.

VI.

CONCLUSION

We affirm the judgment of the court of appeals as to Getty's claims against NL. We reverse the judgment of the court of appeals as to Getty's claims against INA and Youell, and remand those claims to the trial court for further proceedings consistent with this opinion. We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists.

Thomas R. Phillips
Chief Justice

Concurring and Dissenting Opinion by Justice Gonzalez, joined by Justices Mauzy and Doggett.

OPINION DELIVERED: November 11, 1992

IN THE SUPREME COURT OF TEXAS

No. D-1937

GETTY OIL COMPANY AND
TEXACO INC., PETITIONERS

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND YOUELL
AND COMPANIES, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF TEXAS

CONCURRING AND DISSENTING OPINION

I agree with the Court that res judicata bars any action by Getty against NL. I also agree that the summary judgment for INA and Youell should be reversed and

remanded to the trial court. The Court concludes, however, that paragraph two of the contract is an additional insured provision that does not directly support an indemnity agreement. In so doing, the court takes a contract that is ambiguous and makes a factual determination as to its meaning. For this reason, I cannot join the majority opinion. I would hold that the contract is ambiguous as a matter of law, reverse the judgment of the court of appeals, and remand the cause to the trial court for a trier of fact to determine whether the parties intended paragraph two of HB-5357 to be an additional insured provision or an insurance provision in support of the indemnity agreement.

The pertinent rules of contract construction are set out in *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983):

> If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. Whether a contract is ambiguous is a question of law for the court to decide by looking at the circumstances present when the contract was entered. When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue. (citations omitted).

This contract is reasonably susceptible to more than one interpretation.[1] Getty contends that paragraph two of

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[1] The contract provisions at issue read as follows:

> 4. INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser;

[The contract then sets out various required insurance and coverage limits required under the contract]

> All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters of insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.
>
> Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages relating from injury to any person (including injury resulting in death), or damage (including loss or destruction) to property of whatsoever nature of any person arising out of or incident to the performance of the terms of this Order by Seller (including but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order). Seller shall not be held responsible for any

HB-5357 is an additional insured provision and does not directly cover the indemnity agreement, and the anti-indemnity statute was never intended to affect this type of insurance agreement or any other insurance arrangement that is not a direct indemnification. This Court agrees with Getty, relying on the fact that the indemnity provision already contains an insurance procurement provision separate and distinct from the "additional insured" provision; therefore, the indemnity provision already contemplates separate insurance coverage and is not dependent upon the coverages contained in the "additional insured" provision. The Court contends that this argument is strengthened by the languages in the "additional insured" provision which states that NL's insurance shall extend to and protect Getty "whether or not required [by the other provisions of the contract]." This is a reasonable interpretation of these provisions. However, it is not the only reasonable interpretation.

INA and Youell argue that this insurance provision contemplates direct indemnification coverage, obligating NL to contractually indemnify Getty, and thus directly supports an indemnity agreement. This interpretation is also reasonable. Nowhere in HB-5357 is the term "additional insured" or any derivative thereof used. Paragraph one of the contract reads "INSURANCE AND INDEMNITY" and sets out the types and limits of insurance coverage NL is required to

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losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

have under the contract. Both the provision extending NL's insurance over Getty and the indemnity agreement are set out in this section. The last paragraph then states, "[t]he liability of Seller (NL), as herein provided, shall not be limited by the insurance coverage required of Seller."

In construing a contract, courts should look at the contract as a whole in order to give effect to all the provisions. *Coker*, 650 S.W.2d at 393; *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). No single provision will be given controlling effect; rather, all provisions must be considered with reference to the entire writing. *Daniel*, 243 S.W.2d at 393; *Myers v. Gulf Coast Minerals Mgm't Corp.*, 361 S.W.2d 193, 196 (Tex. 1962). Taken as a whole, this "INSURANCE AND INDEMNITY" section seems to contemplate that the insurance coverages set out in these provisions, including the so called "additional insured" paragraph, directly cover any potential liability of NL under the indemnity provision.

Courts should construe contracts in order to give effect to the intention of the parties. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). In this case the intention of the parties is not clear. Both parties present reasonable and logical interpretations, thus subjecting the contract to two reasonable and acceptable meanings, the determination of which is a question of fact. Accordingly, I would reverse the judgment of the court of appeals and remand to the trial

court for a trier of fact to determine the true intent of the parties.[2]

Raul A. Gonzalez
Justice

Justices Mauzy and Doggett join this concurring and dissenting opinion.

OPINION DELIVERED: November 11, 1992

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[2] While this Court has determined that an additional insured provision is not covered by the Anti-Indemnity statute, it has left open the question of whether the statute applies to an insurance procurement provision that directly supports an indemnity agreement. Thus, if the trier of fact determines that this provision does support the indemnity agreement, the question of whether it violates the Anti-Indemnity statute would have to be resolved. Because Section 5 of the statute applicable in this case provides that an oilfield indemnity agreement "shall be responsible for the results of his own actions," TEX. REV. CIV. STAT. art. 2212b(5), I would hold that this agreement is void.

APPENDIX B

THE SUPREME COURT OF TEXAS

No. D-1937

GETTY OIL COMPANY AND TEXACO, INC.,

PETITIONERS

v.

INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. AND YOUELL AND COMPANIES,

RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fourteenth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed in part and reversed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) That part of the judgment of the court of appeals, as to Getty Oil Company and Texaco, Inc.'s claims against NL Industries, Inc., is affirmed;

2) That part of the judgment of the court of appeals, as to Getty Oil Company and Texaco, Inc.'s claims against Insurance Company of North America and Youell and Companies, is reversed;

3) The cause is remanded to the District Court of Harris County, Texas, for further proceedings in conformity with the opinion of this Court;

4) NL Industries, Inc. shall recover from Getty Oil Company and Texaco, Inc., who shall pay, their costs in this Court and in the court of appeals.

5) Getty Oil Company and Texaco, Inc. shall recover from Insurance Company of North America and Youell and Companies, who shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Harris County, Texas, for observance.

(Opinion of the Court delivered by
Chief Justice Phillips)
(Concurring and Dissenting Opinion by
Justice Gonzalez joined by
Justice Mauzy and Justice Doggett)

November 11, 1992

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APPENDIX C

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

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RE: Case No. D-1937

Style: GETTY OIL COMPANY and TEXACO, INC. v. INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC., and YOUELL AND COMPANIES

Dear Counsel:

Today, the Supreme Court of Texas overruled all the motions for rehearing in the above referenced cause. Motion for rehearing on behalf of Youell & Companies is overruled, as supplemented. Youell & Companies motion to substitute counsel is granted.

Sincerely,

John T. Adams, Clerk

by_____
Blanca Morin, Deputy

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APPENDIX D

Affirmed and Opinion filed November 7, 1991.

In The

FOURTEENTH COURT OF APPEALS

NO. C14-90-00552-CV

GETTY OIL COMPANY AND
TEXACO INC., Appellants

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND
YOUELL AND COMPANIES, Appellees

==========

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 89-01695

==========

OPINION

Getty Oil Company (Getty) and Texaco Inc. (Texaco) appeal from a summary judgment in their suit against Insurance Company of North America (INA), NL Industries, Inc. (NL), and Youell and Companies (Youell). Appellants raise seven points of error claiming that NL's agreement to extend all insurance coverage to Getty is not a prohibited indemnity agreement. Appellants also contend that res judicata and collateral estoppel do not bar the instant suit. Because we find res judicata applicable, we affirm the trial court's judgment.

Getty and NL contracted for Getty to purchase chemicals and services. Paragraph 4 of the contract is entitled "INSURANCE AND INDEMNITY." This paragraph provides:

> Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:
>
> . . .
>
> All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount

> of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.
>
> Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages . . . . Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

Carl Duncan, a Getty employee, was injured when a barrel of NL chemicals exploded. Duncan died from his injuries and his estate brought a wrongful death suit against Getty, NL, and others. Getty filed a cross claim against NL for indemnity and contribution. The jury found Getty 100% negligent and the trial court denied Getty's cross-action for contribution and indemnity. Getty settled with the plaintiff but appealed the adverse ruling on its cross action. The trial court's ruling was affirmed on appeal. *See Duncan v. Getty Oil Corp.*, 721 S.W.2d 475 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

Getty then filed the instant suit against NL for breach of contract in failing to name Getty as an additional insured and against the primary and excess carriers, INA and Youell respectively, for not paying on the policies. Appellees filed

motions for summary judgment on the grounds that Getty's claims were barred by the express negligence doctrine, by the Texas Oilfield Anti-Indemnity Statute, and by res judicata. The trial court granted these motions.

A trial court properly grants summary judgment only when the movant establishes that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). In reviewing a summary judgment, an appellate court must accept as true all evidence favorable to the nonmovant, indulging all reasonable inferences and resolving all doubts in the non-movant's favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

In point of error six, appellants claim the trial court erred as a matter of law in granting summary judgment based on res judicata. Res judicata involves the principles of merger and bar. If a plaintiff prevails, his cause of action merges into the judgment, dissolving the cause of action. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985). If, on the other hand, the plaintiff loses the original suit, the plaintiff is barred from bringing another action upon the claims actually litigated *and those that could have been litigated in the original action. Id.*; *Texas Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979). Thus, res judicata prevents a plaintiff from bringing a second suit against the same parties or their privies asserting causes of action arising out of the same subject matter and that might have been asserted in the first suit. *Texas Water Rights Comm'n*, 582 S.W.2d at 772; *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 642 (Tex. 1971). Generally, "a judgment on the merits in a suit on one cause of action is not conclusive of a subsequent suit on a different cause of action except as to issues of fact actually liti-

gated and determined in the first suit." *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973). A party may not, however, relitigate the same claim under a different theory. *see id.* at 537 (citing *Abbott*, 470 S.W.2d at 642).

Appellees argue that appellants' suit is a disguised attempt to relitigate the original claim for indemnity. In support of this argument, appellees cite *Ocean Drilling & Exploration Co., Inc. v. Mont Boat Rental Services, Inc.*, 799 F.2d 213 (5th Cir. 1986). In that case, an Ocean Drilling employee was injured while unloading equipment from a boat owned by Mont. *Id.* at 215. The employee sued Ocean Drilling who in turn filed third-party claims of contribution and indemnity against Mont. *Id.* The jury absolved Mont of any wrongdoing and found Ocean Drilling at fault, assessing damages of $340,000.00. *Id.* The trial court rendered judgment against Ocean Drilling on its third-party claims. *Id.* Ocean Drilling then brought suit against Mont and its insurers and broker for reimbursement of the amount paid to the injured employee. *Id.* The trial court dismissed Ocean Drilling's suit on the ground of res judicata. *Id.*

The Fifth Circuit applied the transactional test of the RESTATEMENT (SECOND) OF JUDGMENTS to determine whether the causes of action in the two suits were the same.[1] *Id.* at 217 (citing RESTATEMENT (SECOND) OF

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[1] The RESTATEMENT transactional test provides:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . ., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or

JUDGMENTS § 24(1) (1982)). Although the court acknowledged that the theories asserted in the two suits were different, the court found that the right Ocean Drilling sought to redress, reimbursement for the obligation incurred as a result of the judgment in the first suit, was the same in both suits. *Id.* Because the two causes of action were based on substantially the same facts, the court held that res judicata barred the second suit. *Id.*

Citing *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973), appellants claim that *Ocean Drilling* is inapplicable because Texas courts expressly refuse to follow the RESTATEMENT transactional test. In *Griffin*, the court clarified a prior holding that a party cannot relitigate matters that could have been raised in a prior action between the same parties or their privies relating to the same subject matter. *Id.* at 537 (citing *Abbott*, 470 S.W.2d at 642). The *Griffin* court held that the term "subject matter" refers to "the claim or controversy at issue in the earlier suit and not to the transaction out of which the suit arose." *Id.* The court further stated:

> We have not said or held that a judgment in a suit on one claim or cause of action is necessarily conclusive of all claims and causes of action against the same party, or relating to the same property, or arising out of the same

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> series of connected transactions, out of which the action arose.

RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). Comment (c) to § 24 adds that multiple transactions are not created simply because a number of legal theories of liability are applicable. RESTATEMENT (SECOND) OF JUDGMENTS § 24, comment (c) (1982).

> transaction. Apparently some courts have gone that far, but we are unwilling to do so.

Id. at 538.

We disagree with appellants' reliance on this statement in *Griffin*. Even if Texas courts do not apply res judicata to all claims arising from the same transaction, they do apply res judicata where a party reasserts the same claim under a different theory. *See id.* at 537 (citing *Abbott*, 470 S.W.2d at 637 (plaintiff lost original suit alleging negligence and attempted to bring second suit alleging products liability)). Thus, we must determine whether appellants' claim in this case is essentially the same claim raised in the prior suit.

In the first suit, appellants sought indemnity from NL under the indemnity provision of the contract. In the instant suit, appellants seek reimbursement of the amount paid to the plaintiff in the first suit from NL and its insurers based on the provision that NL would extend all insurance coverage to Getty. Appellants allege that NL breached its contract by failing to make Getty an additional insured on the policies and that NL's insurers wrongfully denied payment to Getty as an additional insured.

Paragraph 2 of the "INSURANCE AND INDEMNITY" provision of the contract states that "[a]ll insurance coverages carried by [NL], whether or not required hereby, shall extend to and protect [Getty] . . . ." Because appellants seek reimbursement for the amount paid to the plaintiff in the prior suit under this provision, appellees argue that appellants' construction of this provision would transform the provision into a prohibited agreement to indemnify Getty for its sole negligence. Appellees

contend that *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972), *overruled*, *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987), remains viable to the extent it addresses provisions for insurance and that it is controlling in this regard. In *Fireman's Fund*, the contract provided:

> The Contractor shall protect the Owner and Architect-Engineer against all liabilities, claims or demands for injuries or damages to any person or property growing out of the performance of work under this specification.
>
> . . . .
>
> In addition to the Liability Insurance for the protection of the Owner and Architect-Engineer, the Contractor shall, during the continuance of the work under this contract and also extra work in connection therewith, maintain Liability Insurance for injury and/or death to any of his employes [sic] and/or to other persons, including any liability which may arise by virtue of the statute or law now in force or which may hereafter be enacted.
>
> . . . [Contractors] shall specifically and distinctly assume and do so assume all risks of damage or injury from any cause except negligence of Owner . . . .

Id. at 821 (emphasis omitted). Because the *Fireman's Fund* contract required the contractor to carry liability insurance to protect the owner against all claims and demands growing out of performance of the contract, the owner argued that

the contractor agreed to cover the owner's negligent acts. *See id.* at 823. The court disagreed and interpreted the requirement to carry liability insurance as a provision to assure performance of the subsequent indemnity provision and not as evidence of an intent to broaden the contractual indemnity obligation. *Id.*

Although the holding in *Fireman's Fund* indicates that Texas courts will avoid construing an insurance provision to extend an indemnity obligation to cover an indemnitee's sole negligence, factual differences prevent us from holding *Fireman's Fund* controlling. The extension of coverage provision in the NL-Getty contract provides that NL shall extend all of its insurance coverages, *whether or not required by the other provisions of the contract*, to cover Getty. Thus, the express language of the contract precludes a finding, as in *Fireman's Fund*, that the extension of coverage provision was intended only to assure performance of the indemnity agreement.

Appellees argued in the trial court that the extension of insurance provision was unenforceable because it violated a Texas statute and the express negligence test. Article 2212b declares void the indemnity provisions in certain agreements purporting to indemnify the indemnitee against liability for damages caused by its sole or concurrent negligence. *See* Act of June 16, 1973, 63rd Leg. R.S., ch. 646, 1973 Tex. Gen. Laws 1767 (formerly TEX. REV. CIV. STAT. ANN. art. 2212b, §§ 1-2 (Vernon 1979); repealed 1985 and now codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001-127.008 (Vernon 1986 & Vernon Supp. 1991)) (hereinafter referred to as art. 2212b). This statute applies to "agreements pertaining to wells for oil, gas, or water, or mines for other minerals." *Id.* at § 1. Appellants maintain that art. 2212b is inapplicable because: (1) the

instant contract does not contain an indemnity provision prohibited by art. 2212b; (2) the extension of insurance coverage provision does not constitute an indirect indemnity such that art. 2212b applies; and (3) the instant contract is not an agreement pertaining to wells.

We turn first to appellants' claim that art. 2212b is inapplicable because the extension of coverage provision of the contract does not constitute an indemnity obligation. Appellants ask this court to follow case law from federal and other state courts, faced with similar contractual provisions, that held that such provisions are not indemnities rendered void by anti-indemnity statutes or by common law prohibitions. *See Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174, 1177 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985) (where contract required promisor to name promisee as additional insured on promisor's insurance policies, court held that provision was not void under a federal anti-indemnity statute); *Price v. Zim Israel Navigation Co.*, 616 F.2d 422, 428-29 (9th Cir. 1980) (found no violation of federal anti-indemnity statute where contract required promisor to name promisee as co-insured on comprehensive liability policy); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So.2d 851, 856 (Fla. Dist. Ct. App. 1984), *pet. denied*, 464 So.2d 554 (Fla. 1985) (found Florida anti-indemnity statute inapplicable to contract provision obligating promisor to provide insurance and to name promisee as additional insured); *Terrace Shopping Center Joint Venture v. Oxford Group, Inc.*, 192 Ga. App. 346, 384 S.E.2d 679, 680 (Ga. Ct. App. 1989) (held Georgia anti-indemnity statute did not render void a contractual provision requiring promisor to maintain insurance and to name promisee as additional insured on all liability policies); *Bosio v. Branigar Org., Inc.*, 154 Ill. App. 611, 506 N.E.2d 996, 998-99 (Ill. App. Ct. 1987) (where contract required

promisor to furnish insurance indemnifying promisee from all personal injury claims, court found anti-indemnity statute inapplicable because it found the provision to be an agreement to obtain insurance and not an agreement to indemnify); *Zettel v. Paschen Contractors, Inc.*, 100 Ill. App. 3d 614, 427 N.E.2d 189, 191 (Ill. App. Ct. 1981) (where contract required promisor to add endorsement to insurance policies covering promisee's liability, court found Illinois anti-indemnity statute inapplicable); *Heat & Power Corp. v. Air Prod. & Chem., Inc.*, 578 A.2d 1202, 1206 (Md. Ct. App. 1990) (held that contract requiring promisor to name promisee as additional insured did not require promisor to insure promisee against its own negligence); *Kinney v. Lisk Co., Inc.*, 557 N.Y.S.2d 283, 76 N.Y.2d 215, 556 N.E.2d 1091-92 (N.Y. 1990) (found no violation of New York anti-indemnity statute where contract required promisor to maintain such insurance policies as would protect both promisor and promisee); *Pickhover v. Smith's Mgmt. Corp.*, 771 P.2d 664, 668 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990) (where promisor agreed to provide insurance coverage to protect promisee against personal injury, death, or property damage claims, court found provision not subject to Utah rule of strict construction of indemnity agreements).

Appellees, on the other hand, cite a number of cases from other jurisdictions invalidating provisions similar to the one at issue here. *See Singh v. John Gargas Landslide Repairs*, 588 F. Supp. 1359, 1362 (C.D. Cal. 1984) (where contract required promisor to carry insurance, court denied promisee's claim that provision was implied contractual indemnity agreement); *Nesom v. Chevron U.S.A., Inc.*, 633 F. Supp. 55, 59 (E.D. La. 1984) (where contract required promisor to carry insurance protecting both parties, court refused to interpret this to require promisor to insure promisee's negligence because this would violate the

promisee's negligence because this would violate the Louisiana anti-indemnity statute); *University Plaza Shopping Center v. Stewart*, 272 So.2d 507, 512 (Fla. 1973) (where contract required promisor to indemnify promisee and to maintain liability insurance covering both parties, court found that provision did not authorize indemnification for promisee's sole negligence and that insurance coverage did not extend beyond promisor's liability); *Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp.*, 395 Ill. 429, 70 N.E.2d 604, 607 (1946) (Although promisor agreed to provide insurance covering both parties, court refused to construe provision to require promisor to indemnify promisee against its own negligence in absence of clear language in contract to that effect); *Fourfouris v. Standard Oil Realty Corp.*, 100 Ill. App. 3d 162, 426 N.E.2d 915, 916-17 (1981) (followed *Westinghouse* and refused to construe provision to provide insurance as agreement to protect other party against its own negligence in the absence of clear language in contract); *Amoco Prod. Co. v. Action Well Serv., Inc.*, 107 N.M. 208, 755 P.2d 52, 55 (1988) (where contract required promisor to obtain insurance covering indemnity agreement, court held that provision related to insurance purchased by indemnitor to protect its own interest and not to the interest of the indemnitee); *Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351, 1354 (Wyo. 1978) (although contract required contractor to maintain insurance, court expressed doubt that insurance could save a prohibited indemnity agreement, but the court did not need to decide the issue since the insurance policy was not in the record).

Although appellees attempt to attribute the split in authority to differences in the individual contractual provisions and statutes involved, we do not find these distinctions significant. All of the statutes invalidate

indemnity agreements that purport to protect the indemnitee from the results of its own negligence. Appellees argue that, if we look to other jurisdictions for guidance, we should follow the case law in Louisiana, New Mexico, and Wyoming because these states have oilfield anti-indemnity statutes similar to the Texas statute. That the Louisiana, New Mexico, and Wyoming statutes relate to agreements between parties in the oil, gas, or mining industries is, in our opinion, not a persuasive reason to follow the holdings in those states. These statutes, like the non-oilfield anti-indemnity statutes cited in other cases, all prohibit agreements that purport to indemnify the promisee against the results of its sole negligence. Furthermore, the Louisiana statute differs from all other statutes in that it expressly prohibits "waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of [the statute] . . . ." LA. REV. STAT. ANN. § 9:2780(G) (West 1991). The Texas statute includes no such prohibition.

Although some of the cases are distinguishable in that the insurance provisions are expressly tied to the indemnity obligation, *see Fourfouris*, 462 N.E.2d at 917; *Amoco*, 755 P 2d at 53; *Bosio*, 506 N.E.2d at 997; we cannot justify the split in the jurisdictions solely on the basis of differences among the contractual provisions. We find no significant difference between a provision requiring a promisor to obtain and maintain insurance covering the promisee and a provision requiring the promisor to name the promisee as an additional named insured on the promisor's policy.

The cases cited by appellant reason that an insurance provision is distinct from an indemnity agreement because an insurance procurement provision does not make the

Terrace, 384 S.E.2d at 680. Rather, those courts find that such a provision merely shifts the risk of loss to an insurance company and only renders the promisor liable for paying the insurance premiums. *See, e.g., Price*, 616 F.2d at 429. While this may be true, the promisor may be liable for a judgment against the promisee where the promisor breaches the agreement to procure insurance. *See Zettel*, 427 N.E.2d at 193. In making the distinction between insurance and indemnity, those courts fail to mention that, by upholding the insurance provision, the promisee is permitted to do indirectly what it cannot do directly under the anti-indemnity statute -- avoid liability for its sole negligence. *See Nesom*, 633 F. Supp. at 59. Although the provision here is, by its express terms, not intended to support only the indemnity obligation, the effect of upholding it would be to allow Getty to avoid liability for its sole negligence. This result does, as appellees argue, contravene the statutory goal of prohibiting agreements allowing a party to avoid responsibility for the results of its own negligence.

Even if art. 2212b were inapplicable on the ground that the contract does not pertain to oil or gas wells, upholding the instant provision would contravene public policy expressed in Texas common law limiting the right of parties to contract for indemnity. Under the express negligence doctrine, an obligation to indemnify a promisee from the consequences of its own negligence must be specifically expressed in the contract. *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Although case law applies the express negligence doctrine to contractual indemnity provisions, *see Continental Steel Co. v. H.A. Lott, Inc.*, 772 S.W.2d 513, 515 (Tex. App.—Dallas 1989, writ denied), Texas courts would undoubtedly extend this limitation to insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the

results of its sole negligence. *See Fireman's Fund*, 490 S.W.2d at 823. Despite appellants' arguments to the contrary, we find that upholding the extension of coverage provision would allow appellants to avoid the consequences of their own negligence. This relief is identical to that sought in the first suit in its claim for indemnity.

Because appellant seeks reimbursement of the amount paid to the plaintiff in the original lawsuit based on the finding that appellant was solely negligent, appellant seeks the same relief sought in the original suit. Faced with precisely the same circumstances, the Fifth Circuit held that res judicata barred the second sui. *See Ocean Drilling*, 799 F.2d at 215. Similarly, Texas law bars a party from attempting to relitigate a claim for damages under a different theory of liability. *Griffin*, 496 S.W.2d at 537. Because we find that appellant seeks the same relief in this suit as it unsuccessfully sought in the first suit, res judicata bars appellant from reasserting this claim under a different theory. Thus, the trial court properly rendered summary judgment in favor of appellees. We overrule point of error six.

Having held that the trial court properly granted summary judgment based on res judicata, we need not address appellants' other points of error.

We affirm the trial court's judgment.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed November 7, 1991.

Panel consists of Justices Robertson, Sears, and Draughn.

Publish - TEX. R. APP. P. 90.

Y2964\07194\JGC93139.503

NOVEMBER 7, 1991.

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

GETTY OIL COMPANY AND
TEXACO INC., APPELLANTS

NO. C14-90-00552-CV

V.

INSURANCE COMPANY OF NORTH AMERICA,
NL INDUSTRIES, INC. AND
YOUELL AND COMPANIES, APPELLEES

This cause, an appeal from an order granting summary judgment in favor of GETTY OIL COMPANY AND TEXACO INC. signed May 3, 1990, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below AFFIRMED.

We order GETTY OIL COMPANY AND TEXACO INC. jointly and severally to pay all costs incurred by reason

of this appeal. This decision is ordered certified below for observance.

Y2964\07194\JGC93139.503

APPENDIX E

NO. 89-1695-A

GETTY OIL CORPORATION, Succeeded by and a Division of TEXACO, INC., Plaintiff,	§	IN THE DISTRICT COURT
VS.	§	OF HARRIS COUNTY, TX
INSURANCE COMPANY OF NORTH AMERICA; NL INDUSTRIES, INC., D/B/A NL TREATING CHEMICALS, INC.; and YOUELL & COMPANIES	§	280TH JUDICIAL DISTRICT

ORDER GRANTING SUMMARY JUDGMENT

This matter having come before the Court on the motions for summary judgment and amended motions for summary judgment of NL Industries, Inc.; Insurance Company of North America; and Youell & Companies (herein "defendants"); the Court having considered the motions and amended motions and all responses thereto, as well as the arguments of counsel, is of the opinion that defendants' motions and amended motions are well founded and should be granted.

IT IS THEREFORE ORDERED that defendants' motions and amended motions for summary judgment should be and are hereby granted as to all claims asserted against defendants in the pleadings by Getty Oil Company and Texaco, Inc. previously referred to as Getty Oil Corporation, succeeded by and a Division of Texaco, Inc.

IT IS THEREFORE FURTHER ORDERED that defendants have final judgment that plaintiffs take nothing as to

all of plaintiffs' claims and causes of action. Costs are assessed against plaintiffs and in favor of defendants, for which let execution issue if not timely paid.

All relief not expressly granted herein is hereby denied.

Signed this 3rd day of May, 1990.

_____

DISTRICT JUDGE
280TH JUDICIAL DISTRICT COURT

APPROVED AS TO FORM:

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APPENDIX F

NO. D-1937

IN THE TEXAS SUPREME COURT

GETTY OIL CORPORATION,
SUCCEEDED BY AND A
DIVISION OF TEXACO, INC.,

PETITIONER,

V.

INSURANCE COMPANY OF NORTH AMERICA;
NL INDUSTRIES, INC., D/B/A NL TREATING
CHEMICALS INC.; AND YOUELL & COMPANIES,

RESPONDENTS

FURTHER SUPPLEMENT TO YOUELL & COMPANIES' MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE TEXAS SUPREME COURT:

Respondent Youell & Companies wishes to bring to this Court's attention additional authority in support of its Point of Error IV on rehearing, which argues that this Court erred in rendering a *sua sponte* partial summary judgment in favor of Getty. *See* Youell's Motion for Rehearing at 10-14; Youell's Supplemental Brief on Rehearing (Dated February 1, 1993), at 2-3; Youell's letter brief (dated December 7,

1992), at 1-2. This Court should recognize the constitutional due process implications of its decision.

In *Fountain v. Filson*, 336 U.S. 681, 682-83 (1949), the United States Supreme Court held that, just as a trial court cannot grant a *sua sponte* summary judgment without notice and an opportunity for the parties to present all of their defenses, neither may an appellate court, in reviewing grant of summary judgment for one party, grant summary judgment for the other party.

The rule in *Filson* is firmly grounded in principles of due process. The 14th Amendment to the United States Constitution forbids the exercise of judicial power without notice to the defendant and an opportunity to be heard. *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). Notice and an opportunity to be heard are required "even if the facts are clear." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). And, of course, "the fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1965). This is the reason the summary judgment rule requires "adequate procedural opportunity to oppose the motion." *White v. Texas American Bank/Galleria, N.A.*, 958 F.2d 80, 82-85 (5th Cir. 1992). *See Powell v. U.S.*, 849 F.2d 1576, 1579-82 (5th Cir. 1988) ("[T]he . . . court must give proper notice to insure that the nonmoving party had the opportunity to make every possible factual and legal argument," *id.* at 1579); *Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 652 (5th Cir. 1986) (purpose of summary judgment notice requirement is to afford a "reasonable and meaningful opportunity" to be heard); *Winbourne v. Eastern Air Lines Inc.*, 632 F.2d 219, 223 (2d Cir. 1980) (party must be afforded the "due process protections specified in" the summary judgment rule).

The Fifth Circuit has recognized that appellate courts sometimes err by going "too fast in making findings against" movants, thereby depriving movants of the necessary notice of possible findings against them. *Landry v. Air Line Pilots Association International AFL-CIO*, 901 F.2d 404, 437-38 (5th Cir. 1990), *cert. denied* 111 S.Ct. 244 (1990) (modification of opinion on motion for rehearing). In such a circumstance, the overreaching opinion should be limited by modification upon motion for rehearing. *Id.*

On appeal, it is especially important to heed these due process requirements. Unlike a proceeding in a trial court, where a party deprived of notice may at least present his case via a motion for new trial, in an appellate court a party has absolutely no opportunity to present the Court with additional material supporting its case. In ruling that Getty's construction of HB-5357 was correct as a matter of law, this Court violated mandatory procedural safeguards, which resulted in Youell being unable to present *all* of its defenses to Getty's construction of the contract. By so depriving Youell, this Court has violated its right to due process under the 5th and 14th Amendments of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served by certified mail, return receipt requested, to all counsel in the following list, on this the 22nd day of February, 1993.

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(3)

Supreme Court, U.S.
FILED
JUN 25 1993
OFFICE OF THE CLERK

No. 92-1915

In The

Supreme Court of the United States

October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

v.

GETTY OIL COMPANY AND TEXACO INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a summary judgment movant denied due process of law when, in an appeal by the non-movant from the granting of the summary judgment, the highest court of a state construes a document as unambiguous against the construction requested by the movant, and *remands* the case to the trial court for further proceedings consistent with the opinion?

The Supreme Court of Texas did *not* grant Respondents' motion for partial summary judgment, as represented by Petitioners.

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STATEMENT OF THE CASE

Respondents' action as originally instituted against Petitioners ("INA" and "Youell") was essentially an insurance coverage case combined with a breach of contract case against NL Industries Inc. ("NL") for its refusal to extend to Getty the coverages of NL's liability policies with INA and Youell, to protect Getty as an additional insured. The language creating the duties on which the action was based is found in a contract between Getty and NL.

Petitioners filed a motion for summary judgment claiming, among other things, that as a matter of law the contract language should be construed in such a way as to pretermit the action entirely. Respondents had previously filed a motion for partial summary judgment based upon a contrary construction which unambiguously existed as a matter of law.[1] Respondents' motion was denied by the trial court. While the Petitioners' motion was pending, a "mini-trial" was held to determine whether the contract language "was part of an agreement between NL and Getty" at a particular time. The jury found for Respondents.[2]

The trial court then granted Petitioners' summary judgment motion on three grounds: (1) the contract should be construed so as to make the additional insured language an indemnity; (2) an anti-indemnity statute applied; and (3) *res judicata* and collateral estoppel applied.

---

[1] See Respondents' Appendix A.

[2] See Respondents' Appendix B.

Respondents' arguments concerning the unambiguous construction of the contract language, first made in their motion for partial summary judgment, were a part of the appellate record as responses to Petitioners' motion, contrary to Petitioners' representation.[3]

The Texas Fourteenth Court of Appeals affirmed Petitioners' summary judgment on *res judicata,* but rejected Petitioners' construction of the contract language.[4] The Supreme Court of Texas upheld the judgment as to NL on *res judicata* grounds, but sustained the court of appeals opinion on the contract construction issue, agreeing with Respondents' contention that the language unambiguously separated the insurance and indemnity provisions.[5]

Despite Petitioners' many assertions to the contrary in their argumentative "Statement of the Case," the Texas Supreme Court did not grant Respondents' motion for partial summary judgment. The opinion and judgment of the court state that the case is remanded for further proceedings consistent with the opinion.[6] Respondents

---

[3] Such matters, by specific trial court order (see Respondents' Appendix C), were included in Petitioners' summary judgment record and were thereafter specifically included in the appellate record (see indexed items 50, 66, 68 and 77 in the Amended Designation of Transcript, Respondents' Appendix D). (In Texas, in an appeal from a summary judgment, the "Transcript" is the appellate record, except for depositions which may be sent up with the record.)

[4] See Petitioners' Appendix D, pages 7-9.

[5] See Petitioners' Appendix A, pages 23-24.

[6] The judgment says "in conformity with." See Petitioners' Appendices A, page 29; B (no page numbers given).

were not *granted* any affirmative relief, as Petitioners' misrepresentation suggests. The only result in the supreme court was a reversal and remand for further proceedings.

Further, responding to Petitioners' argument in their Statement of Case (see Petition, page 4) that " . . . it has never been determined that a contract exists or that it applies to the underlying circumstances," the verdict of the jury (Respondents' Appendix B) speaks for itself.

SUMMARY OF RESPONDENTS' ARGUMENT: REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

1. The question presented is not within the considerations governing review under Supreme Court Rule 10 because no conflict is shown with the decision of another state court of last resort or of a United States court of appeals, the case does not involve an important question of Federal law which has not been, but should be, settled by this Court and the opinion does not conflict with applicable decisions of this Court.

2. In their statement of the question presented, and in their statement of the case, Petitioners misrepresent the result in the Supreme Court of Texas as the granting of a *sua sponte* partial summary judgment for Respondents, when in actuality the case was reversed and remanded to the trial court for further proceedings.

3. The circumstances of which Petitioners complain present no deprivation of due process of law because Petitioners (a) present no material fact question as to which a hearing is required and therefore have no protected interest; (b) have not shown a deprivation in the absence of the degree of finality represented by a final judgment; (c) placed the issue before the court; and (d) were given adequate notice and opportunity to respond to contrary constructions of the contract language.

4. Petitioners' novel due process theory would deprive courts of their inherent power to declare matters of law and would harm the efficient administration of civil justice.

ARGUMENT

1. THE QUESTION PRESENTED IS NOT WITHIN THE CONSIDERATIONS EXPRESSED IN RULE 10.

Petitioners have not attempted to address the considerations expressed in Supreme Court Rule 10.1(b) or (c). They have not attempted to show any conflict with another state court of last resort or a United States court of appeals or this Court. They do not attempt to suggest how the question presented is "an important question of federal law which has not been, but should be, settled by this Court, . . . "

Particularly because Petitioners have misrepresented the result below by claiming that the Texas Supreme Court *granted* Respondents' motion for partial summary

judgment, but even if the question as restated by Respondents is fully considered, the issue does not present the serious due process problem claimed by Petitioners. A construction of a document as unambiguous, coupled with a remand to the trial court for further proceedings, simply does not rise to the level of a deprivation of due process of law. As shown in the paragraphs to follow, no "important question of federal law" has been presented.

2. MISREPRESENTATION OF THE RESULT BELOW ALONE JUSTIFIES DENIAL OF THE WRIT.

The correct result below is reflected in Petitioners' own Appendix.[7] Petitioners have attempted to invoke the jurisdiction of this Court by making a statement – many times – which is palpably untrue. They have not couched their question and their argument on the proposition that the Texas Supreme Court merely construed the contract as Respondents contended it should be construed. They have not argued that the *effect* is as Respondents would have it had their motion been granted. They have stated as fact that the Texas Supreme Court granted Respondents' motion. That is not true. Petitioners should be denied this Court's review based upon such a misrepresentation.[8]

---

[7] See Petitioners' Appendix A, page 29.

[8] Petitioners used the word "effectively" the first time the contention was made in the text (Petition, page 4), but *not* in their version of the question presented, and they *never again* qualified the statement. Their obvious intent, guilefully, is to bolster their argument by making the supreme court decision appear to have a *judgment* finality which it does not have.

3. THERE IS NO DEPRIVATION OF DUE PROCESS OF LAW.

(a) PETITIONERS' CLAIM DOES NOT INVOLVE A PROTECTED INTEREST.

The analysis of a due process claim begins with an identification of the private interest that is affected by the alleged deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Petitioners claim that they have been deprived of a right to be heard on alternative theories, requiring evidence, about the meaning of the contract. While the right to be heard is a fundamental element of procedural due process, *Armstrong v. Manzo*, 380 U.S. 545 (1965), it does not exist in the abstract. There must be some concrete interest, about which the claimant is entitled to present evidence, which is affected by the alleged deprivation. The question is: right to be heard about what?

Petitioners claim only that they have been deprived of the opportunity to contend, and present evidence, that the contract language in question is ambiguous. Against a holding by the Texas Supreme Court that the language is *unambiguous*, that is not a protected interest.

Petitioners' claim places the cart before the horse. They argue that they should be allowed to urge "course of performance, course of dealing or usage of trade" (Petition, page 6) to establish ambiguity. They argue that they should be allowed to present "extrinsic evidence as to the meaning of the document" (Petition, page 6). They have it backwards and wrong. Evidence of course of dealing (same as "course of performance") or usage of

trade is admissible under Texas law *only after* the court has determined as a matter of law that the language in question is ambiguous, and not for the purpose of determining ambiguity. *Lone Star Gas Co. v. X-Ray Gas Co.*, 164 S.W.2d 504 (Tex. 1942). All that has occurred below is that the Texas Supreme Court has determined that the language is unambiguous. None of Petitioners' alleged "defenses" are material and no evidence concerning them may be admitted.

Petitioners have not been deprived of any right; their complaint is about a supposed right which they never had in the first place.[9]

It is only when *material fact issues* remain to be determined, after a summary judgment is reversed, that due process may require further opportunity to be heard.[10]

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[9] Compare *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (procedural due process protects only those interests to which a person has a "legitimate claim of entitlement".)

[10] That opportunity to be heard is *fact*-oriented, and is not an issue on appeal where questions of law are involved, or where supposed fact issues are not material, or where the facts are not in dispute, is illustrated by the following cases: *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) ("Absent some indication that the moving party might otherwise bring forward evidence that would affect the court's summary judgment determination, failure to provide an opportunity to respond is not reversible error."); *E. C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976) (summary judgment may be entered for the non-moving party "only in the rare case in which it is very clear that all material facts are before the reviewing court."); *Black Warrior Elec. Membership Corp. v. Mississippi Power Co.*, 413 F.2d 1221, 1226 (5th Cir. 1969)

Petitioners, as shown above, do not allege the existence of *material* fact issues. Alleged facts bearing on the issue of ambiguity are not material when the language is unambiguous. *Sun Oil Co. (Del.) v. Madeley,* 626 S.W.2d 726 (Tex. 1981).

Finally, Petitioners' own motion for summary judgment agrees with Respondents. In their motion,[11] Petitioners represented to the trial court that (1) "the construction of this contractual provision is a legal issue for the Court and can never be a jury issue;" and (2) "extrinsic evidence is admissible only if, after applying applicable rules of construction, genuine uncertainty remains as to the proper construction of the contract."

Petitioners should be bound by their representations.

(summary judgment may be entered for the non-moving party where there are no material issues of fact and the parties treat the issue of whether an agreement indemnifies a party for its own negligence as a question of law.); *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 920 (2d Cir. 1964) (declaration as a matter of law that agreement violates statute entitles non-moving party to judgment); *Proctor & Gamble Indep. Union v. Proctor & Gamble Mfg. Co.*, 312 F.2d 181, 190 (2d Cir. 1962) (where collective bargaining agreement expired by its own terms, there was no triable issue of fact and holding that union could not compel arbitration required entry of judgment for company even in absence of cross-motion); *First Nat'l Bank v. Maryland Cas. Co.*, 290 F.2d 246, 251-52 (2d Cir. 1961) (where all issues were before the court and no material issue of fact is disputed, summary judgment may be granted to non-movant).

[11] See Respondents' Appendix E, pages App. 52, 53.

(b) PETITIONERS HAVE NOT SHOWN A DEPRIVATION: THERE IS NO FINAL JUDGMENT.

Although Petitioners have misrepresented that there is a judgment finality to the rights of the parties by their oft-repeated statement that Respondents have been *granted* a partial summary judgment, there is no final judgment, partial or otherwise. The reversal of Petitioners' summary judgment and remand to the trial court is not the kind of "proceeding which is to be accorded finality," *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), to which the due process right might independently apply.[12] The Texas Supreme Court has said, in effect, "If the NL-Getty contract applies, then it has the meaning which we say it has; it is up to the trial court to determine whether it applies."[13]

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[12] Petitioners' one brush with "the requirement of finality," found in footnote 4 (Petition, page 5), is not supported by the cases which they cite. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) involves considerations surrounding an interlocutory appeal under 28 U.S.C. § 1291, and does not support equating a *remand* for trial, after deciding a law question, with a final judgment. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) is a stay order by one justice of a prior restraint on free speech. Justice Blackmun concluded that a delay in a state court review was intolerable and amounted to a decision that the restraint could remain in effect during the delay. That is not remotely analogous to the circumstances of this case.

[13] Note that the court specifically refused to hold that Getty was an additional insured by virtue of the language in question (Petitioners' Appendix A, page 29), considering that to be a "coverage" question. The fact-based defenses which Petitioners may allege about whether *coverage* exists, if the contract does apply, are preserved.

The question, more particularly, involves the application of the doctrine of the law of the case. *See Insurance Group Comm. v. Denver & R.G.W.Ry.Co.*, 329 U.S. 607 (1947). Technically, when a summary judgment is reversed on a question of law, no facts have been determined on the merits. The appellate court is announcing that if the facts at trial, on remand, are the same as the facts on which the summary judgment was based, then the determination of the law question by the appellate court will control the result on remand. The "law of the case" applies to govern the trial, *if on the same facts.* See *Hudson v. Wakefield,* 711 S.W.2d 628 (Tex. 1986). *Compare Pubali Bank v. City Nat'l Bank,* 777 F.2d 1340 (9th Cir. 1985) (it is proper on remand to enter summary judgment for the plaintiff based upon the law of the case unless the defendants produce new evidence to establish the existence of a material fact).

While, realistically, the language of the NL-Getty contract will not change, technically there is nothing to prevent the Petitioners from *contending* that different facts apply than those which were considered in connection with their summary judgment motion. The *opportunity to contend,* even with the smallest chance of success, is the *sine qua non* of due process. *Pennoyer v. Neff,* 95 U.S. 714 (1877); *Grannis v. Ordean,* 234 U.S. 385, 394 (1914).

To be sure, Respondents now contend and will contend at trial that the facts (the contract language) cannot change and that the law of the case will prevent Petitioners from claiming ambiguity in the insurance and indemnity provisions of the contract and from claiming

that the additional insured provision supports the indemnity. Nevertheless, until the trial reaches its conclusion without different evidence (such as that an altogether different contract applied to the circumstances which gave rise to the claim),[14] Petitioners will have an opportunity to be heard. That is due process.

Neither of the other cases relied on by Petitioners is on point. Neither involves a question of contract construction. Both involve actual judgments *against* the party who moved for summary judgment. That is a finality not found in this case. Thus, in *Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700 (7th Cir. 1956), judgment was entered for the non-movant in the trial court; and in *Mingus Constructors v. United States*, 812 F.2d 1387 (Fed. Cir. 1987), judgment was entered for one party on cross-motions for summary judgment. Those cases add nothing to Petitioners' contention.[15]

(c) PETITIONERS PLACED THE ISSUE BEFORE THE COURT.

In their Amended Motion for Summary Judgment, Petitioners specifically requested a judicial construction

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[14] Respondents do not say that there is a different contract. They say only that Petitioners will have the opportunity to present that kind of evidence, if it exists.

[15] The final judgments found in *Prepo* and *Mingus* make clear why Petitioners misrepresented that the Texas Supreme Court granted Respondents' motion for partial summary judgment. That is the only way they could argue that *Prepo* and *Mingus* apply to this case. That is an inexcusable abuse of their duties as officers of the Court.

of the contract language (See Respondents' Appendix E, pages 3-8), advancing a particular construction. Both appellate courts in Texas rejected Petitioner's construction and held that the language had another meaning entirely, as a matter of law. There is no due process right which would prevent a court from declaring the plain meaning of unambiguous language in a document, particularly where the party complaining of a supposed absence of due process invoked the processes of the court to obtain a construction in the first place. Petitioners made the choice of seeking summary judgment on one theory of construction; they cannot now complain that they could have advanced other theories, when the choice of procedure was theirs. See *Gutierrez-Rodriguez v. Cartagena,* 882 F.2d 553 (1st Cir. 1989) (defendant in civil rights case not denied due process when he was not allowed to testify at trial after having asserted Fifth Amendment in pre-trial discovery).

Importantly, the result would have been the same had Respondents *not* filed a motion for partial summary judgment on the construction ultimately adopted by the Texas courts. It would be a strange anomaly to penalize Respondents for filing their motion, when the result would have been the same had they not filed it.[16]

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[16] Note that the question presented, as restated by Respondents, removes from consideration the existence of Respondents' partial motion for partial summary judgment. It is truly irrelevant to the issue before the Court.

(d) PETITIONERS WERE GIVEN ADEQUATE NOTICE AND OPPORTUNITY TO RESPOND.

Respondents' motion for partial summary judgment was filed, heard and denied long prior to Petitioners' motion. The arguments made by Respondents in their motion (later ordered to be a part of *Petitioners'* summary judgment record as a *response* – see Respondents' Appendix C), gave Petitioners adequate notice of the arguments that the contract language was unambiguous, and meant exactly what the court of appeals and supreme court later said it meant. By placing an extreme and patently unreasonable construction on the language, and by seeking summary judgment based on such construction, Petitioners in fact *deprived themselves* of the opportunity to present alternate arguments. Manifestly, Petitioners have not shown that either Respondents or the Texas courts deprived them of *any* substantial right.

The case on which Petitioners principally rely, *Fountain v. Filson*, 336 U.S. 681 (1949), holds merely that an appellate court cannot *find facts* and then enter or instruct judgment for the non-movant, where no cross-motion was filed, when the point on which the summary judgment was granted is reversed. The sole question on appeal in *Fountain* was whether New Jersey law would permit the imposition of a resulting trust under the circumstances presented in the complaint and accompanying documents. The court of appeals, however, after overturning the lower court on that law point, proceeded to review the facts disclosed in the depositions on file, and instructed entry of a judgment for the plaintiffs. That is not what the Texas Supreme Court has done in this

case. The Texas court has not decided any disputed fact question. It has only stated what the words of the contract mean, which is a question of law. While it is clear that an appellate court may not finally declare matters of *fact* on an appeal of a summary judgment, *Gulbenkian v. Penn,* 252 S.W.2d 929 (Tex. 1952), no such prohibition inhibits declarations of matters of *law.*

The United States Fifth Circuit Court of Appeals case relied on by Petitioners, *Landry v. Airline Pilots Ass'n Int'l,* 901 F.2d 404, 437-38 (5th Cir. 1990), *cert. denied,* 111 S.Ct. 244 (1990) is not different from *Fountain.* The Fifth Circuit court made *fact findings* on a summary judgment record and recognized its mistake on rehearing. Notably (see footnote 2 on Motion For Rehearing, page 437), the Court confirmed a holding on a law point relating to the existence of a duty (that a party "clearly did possess fiduciary duties"), and reserved for trial determination the question of whether the duty had been breached. Here the Texas Supreme Court has ruled that the contract has a certain meaning and has reserved for trial determination the question of whether the contract, so construed, will be given effect.

None of the "notice" cases cited by Petitioners is on point.[17] All involve various circumstances relating to the ten-day notice requirement of Fed. R. Civ. P. 56(c) and/or *sua sponte* judgments, with or without written motions. Petitioners had adequate notice of Respondents' contention that the contract language was unambiguous, and of the court of appeals' determination that the language was

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[17] See notice cases cited in Petition, pages 9-10.

unambiguous. They were amply warned that the Texas Supreme Court could decide the issue against them on the same basis.

Contrary to Petitioners' contention based on *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Texas Supreme Court did not here "alter[] the burdens of proof." (Petition, page 11). The contention assumes that proof would be offered by Respondents, failing which they "would not prevail" (Petition, page 11). However, no proof is required (or allowed, for that matter) to demonstrate that the contract language is unambiguous. *Lewis v. East Texas Finance Co.*, 146 S.W.2d 977 (Tex. 1941). Since the language is unambiguous, *neither* side may offer proof of its meaning, one way or the other.

4. PETITIONERS' NOVEL DUE PROCESS THEORY WOULD DEPRIVE COURTS OF AN INHERENT POWER AND WOULD HARM THE ADMINISTRATION OF CIVIL JUSTICE.

Petitioners new due process theory would have a deleterious effect on the administration of justice and would accomplish an absurd result: in any case involving an appeal from a summary judgment, where the judgment depended upon the construction of a document (and no cross-motion for final summary judgment on the same issue was involved), the appellate court would be prevented from declaring the meaning of the document if that meaning was different from the meaning supported by the appellee/summary judgment movant. The court would be forced to say: "We can't tell you what the contract means; it just doesn't mean what the appellee

says." That would be a grossly inefficient result, requiring a trial even if the contract language is unambiguous, and would deprive the court of its inherent power, in the resolution of cases and controversies, to declare matters of law. The declaration of matters of law is the essence of the judicial power. *Marbury v. Madison*, 5 U.S. 137 (1 Cranch 137) (1803); *Muskrat v. United States*, 219 U.S. 346, 356 (1911). *See also, Morrow v. Corbin*, 62 S.W.2d 641, 645 (Tex. 1933); *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979). Moreover, the constitution and laws of the State of Texas give the Texas Supreme Court express power to review questions of law arising in cases decided by the Texas courts of appeals. Tex. Const. art. V, § 3; Tex. Gov't Code Ann., § 22.001 (Vernon 1987). The Texas Supreme Court, therefore, has at minimum the inherent, but more specifically the *express*, judicial power to declare as a matter of law the meaning of an unambiguous contract when that issue is put squarely to it, as it was in this case.[18] Petitioners' position would prevent such a

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[18] This principle is illustrated by a case in which current counsel for Petitioners Youell & Companies was on the other side of the question, representing NL. In *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 873, in an appeal by NL from a summary judgment, the Fifth Circuit Court, applying Texas law, reviewed two separate provisions of a contract, finding one construed by the movant to be a damage limitation provision to be unambiguous against the movant, and the other to be ambiguous. It reversed and remanded, directing a trial as to the parties' understanding of the meaning of the latter provision. Thus, the court exercised its power to determine matters of law. The effects were (1) GHR would not be entitled to contend on remand that the first provision was a damage limitation provision nor would GHR be entitled to introduce evidence to attempt to claim ambiguity;

declaration, based on the fact that Respondents filed a motion for partial summary judgment seeking the same declaration. Since the court would have the power to declare the meaning of the contract if Respondents had *not* filed a motion for partial summary judgment, why should a limitation exist on the court's power when Respondents *did* file such a motion (but which was not involved in the appeal)? There is no such limitation. See *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517 (Tex. 1980).

Petitioners' new due process claim would also eviscerate the law of the case doctrine by depriving appellate courts of the power to declare matters of law, when reviewing summary judgments, for the guidance of lower courts on remand.

Since the analysis of a due process claim requires a balancing test, *Mathews v. Eldridge, supra; Zinermon v. Burch*, 494 U.S. 113 (1990), one of the elements of Petitioners' claim to be weighed in the balance is the adverse effect it would have on the administration of civil justice. Petitioners have not demonstrated that they have been denied an opportunity to present their construction of the contract language. They have presented their construction and both Texas appellate courts have found it wanting. Their interest in presenting additional, putative (and, frankly spurious) contentions is far outweighed by the efficient exercise of the judicial power embodied in a

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and (2) both parties would get a trial on the meaning of the ambiguous provision. The power of the court to declare the meaning of the unambiguous provision *against* the construction advanced by the movant (GHR) apparently was not questioned.

court's declaration of matters of law (here, the meaning of unambiguous contract language).

No deprivation of due process exists in the exercise of that judicial power. No "fundamental unfairness" has been shown. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985), citing *Mackey v. Montrym*, 443 U.S. 1 (1979).

CONCLUSION

Petitioners have not shown any reason why certiorari should be granted. The Court should deny the petition.

Respectfully submitted,

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(4)

Supreme Court, U.S.
FILED
JUN 25 1993
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No. 92-1915

In The

Supreme Court of the United States

October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

v.

GETTY OIL COMPANY AND TEXACO INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Texas**

APPENDICES TO RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX A

NO. 89-01695

GETTY OIL COMPANY, SUCCEEDED BY AND A DIVISION OF TEXACO, INC.,	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. d/b/a NL TREATING CHEMICALS, INC. and YOUELL AND COMPANIES	§	280TH JUDICIAL DISTRICT
	§	(Filed Sep. 20, 1989)

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Getty Oil Company, succeeded by and a division of Getty, Inc. ("Getty"), files this Motion for Partial Summary Judgment, as follows:

I.

ISSUES INVOLVED IN THIS MOTION

Getty seeks summary judgment on three issues. Getty asks the Court to (1) construe the key provision of the contract that is the focus of this litigation, and declare that it imposes an obligation on NL Industries, Inc. ("NL") to extend existing insurance coverages separate and apart from any obligation to indemnify; (2) determine that the Duncan Accident for which Getty was assessed liability in previous litigation was an occurrence

which was within the risks insured against by the insurance protecting NL and (3) determine that Chapter 127 of the Texas Civil Practice and Remedies Code does not prohibit the contract involved in this litigation. Pursuant to Rule 166a(d) Tex. R. Civ. P., Getty asks that the Court, to the extent that it does not grant summary judgment on the issues presented, to ascertain what material facts are without substantial controversy, and deem those facts established for trial on the remaining disputed points.

II.

BACKGROUND AND DEFINITIONS

In November, 1983, Carl Duncan ("Duncan") was injured when a barrel of chemicals called Drop WT-210 exploded at Getty Well No. 116 in West Texas, at which he was working, dousing him with the flammable chemical and burning him severely. Duncan eventually died from the injuries he suffered as a result of the accident (the "Duncan Accident"). His legal representatives and heirs brought litigation in the 130th District Court of Matagorda County, Texas, Cause No. 84-S-0194C, styled *Carl Duncan, et al. v. Getty Oil Corp., et al.*, (the "Duncan Case"), to recover damages for Duncan's injuries and eventual death. Judgment was entered on April 24, 1985, against Getty alone, for the sum of $28,727,000 in compensatory and punitive damages.

The barrel of chemicals which exploded was sold to Getty by NL under Blanket Purchase Order No. HB-5357, dated effective August 1, 1983 (the "NL-Getty Contract"). The NL-Getty Contract expressly incorporated the terms of a document entitled "Work Order Conditions." A true

and correct copy of the contract in question is attached as Exhibit "D" to the affidavit of W. Allen Brumley, filed herewith (the "Brumley Affidavit").

The NL-Getty Contract was one of a series of blanket purchase orders initiating in 1979 and continuing until 1984 (*see* Exhibits A through D of the Brumley Affidavit), as related to the Getty Midland District operations. Each of such blanket purchase orders contained the "Work Order Conditions." A continuing course of conduct by both NL and Getty, consisting of purchases, deliveries, treatments and other operations, both before and after the Duncan Accident, occurred under such blanket orders (see the Brumley Affidavit). See also the affidavit of Kenneth M. Miller (the "Miller Affidavit") submitted herewith).

At the time of the Duncan Accident, NL maintained a policy of general liability with the Insurance Company of North America, Policy No. SCG2097470 (the "INA Policy"). In addition, NL was covered by excess insurance referred to as Companies Collective Policies, being Policies Nos. 551/UPA0067 ("Collective I Policy") and 551/UPA0068 ("Collective II Policy"), (collectively referred to as the "Collective Policies"). Also, NL was insured by a policy of umbrella insurance issued by a group of Lloyd's syndicates, being Policy No. 551/UQA0049 (the "Lloyd's Policy"). Attached to the affidavit of Joe G. Roady filed herewith (the "Roady Affidavit") as Exhibits "A," "B" and "C" to such affidavit are true and correct copies of the policies. The Defendants have admitted in pleadings filed in this case, and there is no dispute, that NL was the insured under the INA Policy, the Collective Policies, and

the Lloyd's Policy and that such policies were in effect at the time of the Duncan Accident.

III.

SUMMARY JUDGMENT ISSUES

A. CONSTRUCTION OF THE WORK ORDER CONDITIONS

At the focus of this litigation is the blanket purchase order contract dated effective August 1, 1983 (the "NL-Getty Contract"). Getty purchased certain chemicals from NL under the NL-Getty Contract, covered by the Work Order Conditions of the contract, including the barrel of Drop WT-210 which was involved in the Duncan Accident. The contractual obligations of the parties are defined by those documents. The language of the contractual provisions in issue is clear and unambiguous. Paragraph 4 of the Work Order Conditions provides:

> INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:

WORKMEN'S COMPENSATION		STATUTORY
EMPLOYERS' LIABILITY		$500,000
GENERAL LIABILITY:	BODILY INJURY	500,000
	PROPERTY DAMAGE	COMBINED SINGLE LIMIT
AUTOMOBILE LIABILITY:	BODILY INJURY	500,000
	PROPERTY DAMAGE	COMBINED SINGLE LIMIT

All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.

Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages resulting from injury to any person (including injury resulting in death), or damage (including loss or destruction to property of whatsoever nature of any person arising out of or incident to the performance of the terms of this Order by Seller (including, but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order). Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

Under the terms of the Work Order Conditions, NL, as "Seller," had several obligations to Getty, as "Purchaser." One contractual obligation was for NL to provide Getty with all of the insurance coverage actually carried by NL, pursuant to the provision stating, "All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full extent of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers." The only possible construction of this language (hereafter referred to as the "Extension of Coverage Provision") is that NL was required to extend existing insurance coverage to Getty, so that Getty would be entitled to invoke the coverage in connection with the Duncan Accident.

1. The Language of the Work Order Conditions is Unambiguous

The task of this Court is to enforce the agreement of the parties as found in the language of the Work Order Conditions. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 727-28 (Tex. 1981) . The intent of the parties as expressed in the language of the contract is controlling, unless the terms of the contract are ambiguous. *Id.* Whether the Extension of Coverage Provision is unambiguous is a question of law. Thus, Getty is entitled to a summary judgment if only one reasonable interpretation of the Extension of Coverage Provision exists. *Coker v. Coker*, 650 S.W.2d at 394; *Gulf &*

Basco Co. v. Buchanan, 707 S.W.2d 655, 657 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.).

The language of the Extension of Coverage Provision clearly and explicitly states that *all* insurance carried by NL must also protect Getty, even if that insurance is not required by other provisions of the Work Order Conditions. In other words, while the first paragraph of Paragraph 4 required certain minimum insurance coverage, the second paragraph (the Extension of Coverage Provision) required the extension to Getty of existing coverages, whether or not obtained in compliance with the minimum coverage obligation. The words, "All insurance coverages carried by Seller [NL] . . . shall extend to and protect Purchaser [Getty] . . . " can have no other meaning but that in relation to its dealings with NL, and the products supplied to it by NL, Getty is entitled to the protection of all insurance coverage carried by NL during the term of the contract.

2. The Separate Obligation to Provide Getty with NL's Insurance Coverage

The obligation of NL that Getty be protected by NL's existing insurance contracts is separate and distinct from the other contractual obligations created under Paragraph 4 of the Work Order Conditions. In the first provision of Paragraph 4, NL agreed to maintain specified minimum amounts and types of insurance acceptable to Getty. In addition, under the third provision of Paragraph 4, NL had the contractual obligation to indemnify, defend, and hold Getty harmless from losses resulting from NL's negligence arising out of the performance of the contract.

Thus, there are at least three distinct and separate obligations imposed by the language of Paragraph 4: (1) for NL to maintain minimum liability insurance coverage; (2) for NL to provide to Getty the coverage of its existing insurance policies; and (3) for NL to indemnify Getty from losses resulting from NL's negligence in the performance of the contract. The third obligation, concerning indemnification, was resolved by the results of the Duncan Case, in which NL was found to be zero percent (0%) negligent for the Duncan Accident. Getty's cross-claim for contribution and indemnity in the Duncan Case was therefore denied. Consequently, NL had no obligation to indemnify Getty in connection with the Duncan Accident. However, the requirement that Getty be protected under NL's existing insurance policies is a different requirement and has not been adjudicated.

The Defendants contend that the obligation to provide insurance coverage to Getty existed only to support the obligation to indemnify Getty. That argument ignores the unambiguous language of Paragraph 4 of the Work Order Conditions. The Extension of Coverage Provision is a specific command: the coverages of existing policies "*shall* extend to and protect" Getty. The word "protect" connotes broad coverage, such as would pertain to an additional insured, rather than a narrow coverage, such as limited to indemnity. Importantly, *there is no mention of a limitation to indemnity* either in the language of the Extension of Coverage Provision or elsewhere.

Read alone, the Extension of Coverage Provision obviously cannot be construed as limited only to a coverage of NL's indemnity obligation, as defendants contend. Nor may that reading be applied when the provision is

considered together with *all* of the language of Paragraph 4. For example, the last sentence of Paragraph 4 explicitly states that the liability of NL under Paragraph 4 is *not* limited by the insurance coverage it must maintain. This provision has two effects: (1) it means that the indemnity liability may be greater than the minimum insurance required; and (2) it confirms that if existing coverages exceed the minimum amounts required, the liability to Getty either on the indemnity *or otherwise* is not limited to the minimum amounts. Hence, NL's obligations concerning insurance and indemnity, while potentially overlapping where indemnity is concerned (the indemnity liability, when found to exist, could be paid through resort to the required minimum insurance), do not coincide where the Extension of Coverage Provision is concerned. Thus, the last sentence of the paragraph is a recognition that either the indemnity obligation or the Additional Insurance Provision may result in the imposition of liability in an amount greater than the minimum required insurance. It cannot be read as imposing on the Extension of Coverage Provision a limitation to coverage of the indemnity only. The Extension of Coverage Provision must involve a separate obligation.[1]

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[1] It is significant to note that the meaning of the last sentence was broadened by a change occurring first in the 1982-83 version of the contract (HB-5250). Prior to that contract (*see* HB-4856, Exh. B to the Brumley Affidavit), the last sentence read as follows, with the included portion deleted in subsequent versions:

> The liability of seller *under the provisions of this Purchase Order under which Seller agrees to defend,*

To confirm that the Extension of Coverage Provision involves a separate obligation, the third paragraph (the indemnity provision) of Paragraph 4 concludes with the statement that insurance covering the indemnity agreement shall be provided by NL. This is the *third* time specific insurance requirements are stated: first, the minimum requirement; second, the Extension of Coverage Provision; and third, the requirement to cover the indemnity. If the Extension of Coverage Provision is related to indemnity, why have the provision requiring insurance to cover the indemnity? If the Extension of Coverage Provision is co-extensive with the indemnity obligation *there is no need for a specific requirement for insurance to cover the indemnity.*

Further, the requirement for insurance to cover the indemnity is clearly distinct from the obligation to extend full protection to Getty under NL's insurance policies because the Extension of Coverage Provision states, "All insurance coverages carried by [NL], *whether or not required hereby,* shall extend to and protect [Getty] . . . "

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indemnify and hold harmless Purchaser shall not be limited by the insurance coverage required of Seller hereunder.

In HB-5250 and HB-5357 (the NL-Getty Contract) the deleted language was replaced by the phrase "as herein above provided." Where formerly the "not limited by" provision related only to the indemnity obligation, the later versions (including the 1983-84 version involved here), referred to *all* of the obligations of Paragraph 4. The intent was obviously to broaden the effect of the last sentence of the paragraph. The effect is an obvious recognition that more liabilities are provided for in Paragraph 4 than merely indemnity. The obligation (and potential liability) to extend the benefits of existing coverage is one of these other, separate liabilities.

The command is: "Notwithstanding and in addition to the required minimum coverage, and notwithstanding and in addition to any insurance required to cover the indemnity, whatever coverage NL maintains shall extend to and protect Getty." Stated another way, the effect of the phrase "whether or not required hereby," as applied to the remainder of the sentence, is to say, (1) "when insurance is specifically required by this contract, NL's existing coverage protects Getty"; and (2) "NL's existing coverage protects Getty even if coverage is not specifically required by other provisions of this contract." So read, the operative language then, as applied here, is, "All insurance coverages carried by (NL) shall extend to and protect (Getty)." There can be no dispute about the meaning of such words.

As a matter of law, the Extension of Coverage Provision of Paragraph 4 imposes a distinct and different duty than the indemnification requirement. The clear and unambiguous meaning of the Extension of Coverage Provision is that, regardless of NL's other obligations to Getty or the insurance coverage required of it, Getty must be extended the protection of the coverage of any insurance policy which covers NL.

The distinction between an obligation to indemnify and an obligation to provide insurance has been drawn by the Fifth Circuit Court of Appeals. In *Voisin v. O.D.E.C.O Drilling Company*, 744 F.2d 1174 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985), a case arising in Texas, the Fifth Circuit ruled that a cause of action based on contribution and indemnity was not the same as a claim for failure to provide insurance. In *Voisin*, a contract existed which required all of the third-party defendant's insurance policies to name the third-party plaintiff as an

additional insured. The contract also contained an indemnity provision operating in favor of the third-party plaintiff. Although the indemnification provisions were found to be illegal under a particular section of the Longshoremen's and Harbor Workers' Compensation Act, the Fifth Circuit did not invalidate the contractual requirement to provide insurance. The Court viewed the indemnification provision of the contract and the requirement to provide insurance as different obligations and held that the third-party defendant had breached its obligation to add the third-party plaintiff as an additional insured on its insurance policies.[2]

As a matter of law, the meaning of the Extension of Coverage Provision is that all insurance coverage carried by NL must be extended to and protect Getty.

Reasonable minds cannot differ that the meaning of the language of the Work Order Conditions is to entitle Getty to the protection of NL's insurance; therefore, there are no issues of material fact relating to the interpretation of the Extension of Coverage Provision of Paragraph 4 of the Work Order Conditions. The Court should enter partial summary judgment as a matter of law declaring the meaning of Paragraph 4 as applied here, and declaring that Getty is entitled to the protection of the insurance coverage carried by NL at the time of the Duncan Accident.[3]

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[2] This distinction has also been recognized in the Ninth Circuit, in *Price v. Zim Israel Navigation Company,* 616 F.2d 422 (9th Cir. 1980).

[3] Decision of this issue establishes NL's liability to Getty. However, this is a separate issue from the question of whether

B. THE DUNCAN ACCIDENT WAS AN OCCURRENCE COVERED BY NL's INSURANCE POLICIES

Getty also seeks a determination from the Court that the Duncan Accident was a type of occurrence which was covered by each of NL's insurance policies. The terms of the insurance policies are clear and unambiguous. Copies of the several policies are attached to the Roady Affidavit.

1. The INA Policy.

The INA Policy protecting NL is a general liability policy. The policy period for the INA policy was from March 1, 1983 to March 1, 1984. The Getty Accident occurred on November 22, 1983, clearly within the policy period.

The INA Policy covers "all sums which the Insured shall become legally obligated to pay as damages because of (A) Bodily Injury or (B) Property Damage to which [the] insurance applies, caused by an occurrence . . . " (Coverage Part I). "Occurrence" is defined under the INA Policy in Endorsement No. 20 as, "An Event, including injurious exposure to, Conditions, which results during the policy period in Bodily Injury or Property Damage Neither expected nor intended from the standpoint of the Insured." Hence, the Duncan Accident, which resulted in

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Getty is entitled to enforce the NL policies against INA and Youell. That question requires inquiry into issues raised by the affirmative defenses pleaded by NL's insurers, such as satisfaction of policy conditions, waiver, voluntary payment, and the like, as to which the facts are not yet sufficiently developed.

bodily injury to Carl Duncan was an "occurrence" as defined under the INA Policy.

In addition, INA is legally obligated to pay the amount of damages NL must pay, defined as "damages for death and for care and loss of services resulting from bodily injury and damages for loss of use of property including consequential damages resulting from property damages." (Endorsement No. 21). The injuries and death of Carl Duncan clearly fall within the definition of "bodily injury", which under the INA Policy is "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom . . . " (Definitions). Under its insurance policy, INA's liability is limited to $1 million for each occurrence of Bodily Injury Liability, as provided in Endorsement No. 3 (Revised).

Also, the "policy territory" means, in pertinent part, "(1) the United States of America, its territories or possessions, or Canada, or . . . (3) anywhere in the world with respect to damages because of bodily injuries or property damage arising out of a product which was sold for use or consumption within the territory described in paragraph (1) above, provided the original suit for such damages is brought within such territory . . . " (Definitions) The Duncan accident is obviously within the territorial limits of the INA Policy coverage.

Also, none of the exclusions of the INA Policy apply to the damages resulting from the Duncan Accident. Hence, the Duncan Accident was an occurrence resulting in damages for which INA provided insurance coverage to NL, under the terms and definitions of the INA Policy.

Pursuant to the terms of the INA Policy, Getty requests the Court enter a summary judgment that the Duncan accident is an occurrence covered by the provisions of the INA Policy.

Finally, both NL and INA have admitted that INA provided a defense to NL in the Duncan Case, without reservation of rights, which is tantamount to an admission that the INA Policy covered the Duncan Accident. See NL responses to Getty Requests for Admissions Nos. 23, 24, First Set; INA responses to Getty Requests for Admissions Nos. 15, 16, First Set.

2. The Collective I Policy

NL was also covered by three numbered excess policies (each having several forms of separate policies collectively constituting the coverage), with Youell & Companies representing all the insurers. The policy period for the Collective I Policy was from March 1, 1982 to March 1, 1985, within which the Duncan Accident occurred.

The Collective I Policy provides coverage in excess of the INA Policy, for the "ultimate net loss" up to $5 million. (Insuring Agreements II). The term "ultimate net loss" is defined as:

> . . . the total sum which the Assured or his Underlying Insurers as scheduled, or both, become obligated to pay by reason of personal injuries, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid

> as salaries, wages, compensations, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurers permanent employees.

(Definitions 7.)

By its Collective I Policy, Youell & Companies agreed to pay the damages, as defined, for "all sums which the Assured shall be obligated to pay by reason of the liability (a) imposed upon the assured by law, or (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in its capacity as such, for damages on account of personal injuries caused by or arising out of each occurrence happening anywhere in the world." (Insuring Agreements I). An "occurrence" under the Collective I Policy means "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period." (Definition 5). The Duncan Accident is within the definition of "occurrence" and the injuries and death suffered by Duncan fall under the term "personal injuries" under the Collective I Policy.

The phrase "personal injuries" is defined as, "bodily injury (including death at any time resulting therefrom),

mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities." (Definitions 2).

No exclusions under the Collective I Policy applied to the Duncan Accident.

The Duncan Accident resulted from an explosion of the chemicals called Drop WT-210, manufactured by NL. The accident is an occurrence covered by the Collective I Policy. The liability of the Collective I Policy is $5 million, in excess of the coverage of the INA Policy (Insuring Agreements I).

3. The Collective II Policy

The term of the Collective II Policy was March 1, 1982 to March 1, 1985. The Collective II Policy provided coverage in excess of the INA Policy and the Collective I limit. The limit of the Collective II Policy is $5 million, which shall be paid after the INA and Collective I Policy limits are met. (Insuring Agreements II).

The coverage of the Collective II Policy is co-extensive with Collective I. The Collective II Policy covers "each occurrence happening anywhere in the world, and arising out of the hazards covered by and as defined in the underlying umbrella policies stated in Item 2 of the Declarations and issued by the Insurers as specified thereunder." (Insuring Agreements I). The underlying umbrella policy referred to by the Collective II Policy in

Item 2 is the Collective I Policy. Thus, the Duncan accident falls within the coverage provided by the Collective II Policy, since the Collective I Policy coverage extends to the Duncan Accident.

4. The Lloyds Policy

The Lloyds Policy was effective from March 1, 1983 to March 1, 1984. The Lloyds Policy provided umbrella coverage in excess of the INA and Collective Policies, up to $20 million in liability. (Insuring Agreements II). Like the Collective II Policy, the coverage of the Lloyds Policy is co-extensive with that of the Collective I Policy. (Insuring Agreements I). Hence, the Duncan Accident is an occurrence covered by the Lloyds Policy, since the Collective I Policy covered such an event.

In summary, as a matter of law, the terms of the INA Policy, the Collective Policies, and the Lloyds Policy cover the Duncan Accident. Partial summary judgment should be entered declaring that the Duncan Accident was an insured occurrence under the insurance carried by NL.

C. APPLICATION OF CHAPTER 127 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

Getty requests a declaration from the Court that Chapter 127 of the Texas Civil Practice and Remedies Code, relating to indemnity provisions in certain mineral agreements, does not apply to the claims of Getty.

Chapter 127 of the Civil Practices and Remedies Code, in general, voids a contract relating to oil, gas, or water wells, when the contract purports to indemnify a party against its own negligence. (Tex. Civ. Prac. Code § 127.003) (hereinafter, references to Sections are to the Civil Practices and Remedies Code). The Legislature has determined that agreements that provide for indemnification of a negligent indemnitee are against the public policy of this state. (Section 127.002). However, Chapter 127 of the Civil Practice and Remedies Code is not applicable to the present contract. Getty requests a summary judgment declaring that Chapter 127 does not prohibit the enforcement of the Extension of Coverage Provision of the NL-Getty Contract.

First, Section 127.006 expressly states that the provisions do not affect the validity of an insurance contract. The provisions of Paragraph 4 of the Work Order Conditions of the NL-Getty Contract (quoted on pages 4-5) requiring the extension of insurance coverage, thus at minimum making Getty an "additional insured," are, as a matter of law, an "insurance contract". Thus, the claims of Getty to enforce the provisions giving it additional insured status are outside of the scope of Chapter 127 by the Chapter's own terms.

No cases have been decided which construe Chapter 127 and the meaning of "insurance contract". The question is therefore one of first impression.

However, status as an "insurance contract" of a contract obligating a party to provide insurance in the precise context of a co-existing obligation to indemnify is confirmed by *Voisin v. O.D.E.C.O. Drilling Company*, 744

F.2d 1174 (5th Cir. 1984), previously discussed. *Voisin* holds that the two obligations are entirely separate. The prohibition of Chapter 127 of the Civil Practice and Remedies Code applies *only* to agreements to indemnify negligent parties. The claims of Getty in this action do not arise from NL's obligations to indemnify Getty; they are based on NL's obligation to provide insurance coverage. Thus, the statute is inapplicable.

Moreover, Section 127.003 acts to void an agreement purporting to indemnify a person against his own negligence or the concurrent negligence of someone directly responsible to the indemnitee. The terms of Paragraph 4 explicitly state that Getty will *not* be indemnified for losses resulting from *Getty's* sole negligence. The indemnity provisions do not contravene the statute. The terms of Chapter 127 thus have no bearing on Paragraph 4.

Accordingly, Chapter 127 of the Texas Civil Practice and Remedies Code is not applicable to the present litigation as a matter of law. The Court should enter a partial summary judgment declaring that the obligation in the NL-Getty Contract for NL to extend to Getty the coverage of existing insurance is not prohibited by Chapter 127.

WHEREFORE, Getty requests that the Court declare (1) that the terms of the Work Order Conditions obligate NL to extend to Getty the insurance coverage carried by NL at the time of the Duncan Accident; (2) that the Duncan Accident was an occurrence covered by the insurance policies protecting NL; and (3) that Chapter 127 of the Texas Civil Practice and Remedies Code does not prohibit the enforcement of the Extension of Coverage Provision of the NL-Getty Contract. Further, to the extent

that the matters submitted are not fully adjudicated, Getty requests that the Court, pursuant to Rule 166a(d), Tex. R. Civ. P., ascertain what material facts exist without substantial controversy and enter an order specifying such facts.

Respectfully submitted,

SHEINFELD, MALEY & KAY,
A Professional Corporation

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ATTORNEYS FOR PLAINTIFF, GETTY OIL CORPORATION, Succeeded by and a Division of Getty, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Motion For Partial Summary Judgment of [sic] was served upon counsel of record listed below by delivery on this ____ day of September, 1989.

_____
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APPENDIX B

CAUSE NO. 89-01695

GETTY OIL COMPANY AND TEXACO, INC. Plaintiff,	:	IN THE DISTRICT COURT OF
VS.	:	HARRIS COUNTY, TEXAS
NL INDUSTRIES, INC., ET AL Defendants	:	280TH JUDICIAL DISTRICT

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CHARGE OF THE COURT

Members of the Jury:

This case is submitted to you by asking a question about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will

not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the question accordingly. Simply answer the question, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers, that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer the questions submitted to you "yes" or "no" unless otherwise instructed. A "yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." If the questions direct you to give an answer other than "yes" or "no," you must still base your answers on a preponderance of the evidence with respect to each matter inquired about in the question.

You are instructed that preponderance of the evidence means the greater weight and degree of credible evidence introduced before you and admitted in this case.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by witnesses who saw the act done or heard the words spoken or by documentary

evidence. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

You are instructed that an agreement for the sale of goods may be made in any manner sufficient to show agreement including conduct by both parties which recognizes the existence of such an agreement.

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing or course of performance

A "course of dealing" is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

Where an agreement for sale, if any, involves repeated occasion for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

You are instructed that the HB purchase order documents are not sufficient in and of themselves to create a legally binding agreement.

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and

then you will deliberate upon your answers to the questions made.

It is the duty of the presiding juror:

1. To preside during your deliberations;

2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. To write out and hand to the bailiff any communications concerning the case which you desire to have delivered to the judge;

4. To vote on the questions;

5. To write your answers to the questions in the spaces provided; and

6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the judge, and your presiding juror has placed your answers

in the spaces provided, and signed the verdict as presiding juror or obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ Tony Lindsay
HONORABLE TONY LINDSAY
Judge, 280th District Court

TL:lt

QUESTION NO. 1

Was Work Order Conditions Exhibit "A" a part of an agreement between NL and Getty at the time of the sale of the barrel of chemicals that occurred on 9-15-83?

Answer "Yes" or "No"

Answer: Yes

CERTIFICATE

We, the Jury, have answerd [sic] the above and foregoing questions as herein indicated, and herewith return same into Court as our verdict.

(To be signed by the presiding jury if unanimous.)

/s/ James G. Steffen
Presiding Juror

(To be signed by those jurors who agree with the verdict if not unanimous.)

PLEASE PRINT	SIGNATURE
1._____	1._____
2._____	2._____
3._____	3._____
4._____	4._____
5._____	5._____
6._____	6._____
7._____	7._____
8._____	8._____
9._____	9._____
10._____	10._____
11._____	11._____

_____

APPENDIX C

NO. 89-01695

GETTY OIL COMPANY, SUCCEEDED BY AND A DIVISION OF TEXACO INC.,	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. d/b/a NL TREATING CHEMICALS, INC. and YOUELL AND COMPANIES.	§	280TH JUDICIAL DISTRICT

ORDER

ORDERED THAT Plaintiffs' (i) Motion for Summary Judgment filed on September 20, 1989; (ii) Second Motion for Partial Summary Judgment filed on December 21, 1989; (iii) Response to Youell and NL's (Second) Motion for Summary Judgment filed on January 5, 1990; and (iv) Plaintiffs' Response to Defendants' (Third) Motion for Summary Judgment filed March 2, 1990 together with English and American's Response to Youell and NL's Motion for Summary Judgment filed on January 5, 1990 and English and American's Response to Defendants' (Third) Motion for Summary Judgment filed on or about March 2, 1990, the depositions previously filed with the Court and all summary judgment proof, exhibits and other papers filed in connection with any of the above

referenced pleadings shall collectively be considered as a response to Defendants' pending Amended Motion for Summary Judgment scheduled to be heard on March 30, 1990. It is further

ORDERED THAT Youell and NL's (Second) Motion for Summary Judgment filed on or about November 28, 1989 and Defendants' Reply to Plaintiffs' Response to Youell and NL's (Second) Motion for Summary Judgment filed January 10, 1990 shall collectively be considered in the pending Motion for Summary Judgment. It is further

ORDERED THAT all pleadings are subject to objections previously raised. It is further

ORDERED THAT the Court shall also consider all replies filed, with leave of Court, within seven (7) days of the hearing on March 30, 1990.

Signed March 23, 1990.

/s/ Tony Lindsay
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

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APPENDIX D

NO. 89-01695

GETTY OIL COMPANY, SUCCEEDED BY AND A DIVISION OF TEXACO INC.,	§	IN THE DISTRICT
	§	COURT OF
	§	
	§	HARRIS
V.	§	COUNTY, TEXAS
	§	
INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. d/b/a NL TREATING CHEMICALS, INC. and YOUELL AND COMPANIES.	§	280TH JUDICIAL
	§	DISTRICT
	§	
	§	(Filed
	§	Jun. 04 1990)
	§	
	§	
	§	
	§	

AMENDED DESIGNATION OF TRANSCRIPT

Getty Oil Company and Texaco Inc. ("Texaco"), pursuant to Rule 51, Tex. R. App. P., hereby designate the contents of the transcript on appeal, requesting the District Clerk to prepare and transmit to the Court of Appeals a transcript containing the following matters:

1. Plaintiffs' Original Petition in No. 86-CV-0988, filed 8-25-86.

2. Plaintiffs' Original Petition in No. 87-CV-2038, filed 11-18-87.

3. Defendant NL Industries' Original Answers Subject to Joint Motion to Transfer Venue, filed 8-26-88.

4. Original Answer of INA, filed 8-26-88.

5. Original Answer of Companies Collective Subject to Joint Motion to Transfer Venue, filed 8-26-88.

6. Defendant INA's First Amended Answer with Affirmative Defenses, filed 9-26-88.

7. Defendants' Original Answer Subject to Motion to Transfer Venue in No. 87-CV-2038, filed 9-26-88.

8. Youell and Companies' Amended Answer to Plaintiffs' Petitions Subject to Motion to Transfer Venue, filed 10-17-88.

9. Order of Consolidation of Nos. 86-CV-0988 and 87-CV-2038.

10. Order Transferring Venue from Galveston to Harris County, filed 12-19-88.

11. NL Industries' Motion for Summary Judgment, filed 1-27-89.

12. Plaintiffs' Request for Admissions to Youell and Companies, filed 1-30-89.

13. Plaintiffs' Request for Admissions to INA, filed 1-30-89.

14. Plaintiffs' Request for Admissions to NL Industries, Inc., filed 1-30-89.

15. Youell and Companies' Motion for Summary Judgment, filed 1-31-89.

16. INA's Motion for Summary Judgment, filed 2-09-89.

17. Plaintiffs' Amended First Set Request for Admissions to Youell and Companies, filed 2-15-89.

18. Plaintiffs' Second Amended Petition, filed 2-22-89.

19. Youell and Companies' Requests for Admissions to Plaintiffs, filed 2-24-89.

20. Plaintiffs' Response to Motions for Summary Judgment of INA Youell and NL, filed 2-24-89.

21. Affidavit of Annette Kolodize, filed 3-01-89.

22. Affidavit of Irvin Apffel, filed 3-03-89.

23. Order Denying Defendants' Motion for Summary Judgment, dated 3-16-89.

24. Youell's Third Party Action Against Travelers Insurance Company filed 3/31/89.

25. Youell's Response to Plaintiffs' Request for Admission, filed 3-31-89.

26. Plaintiffs' Response to Youell's Request for Admissions, filed 3-31-89.

27. NL's Response to Plaintiffs' Request for Admissions, filed 3-31-89.

28. INA's Response to Plaintiffs' Request for Admissions, filed 3-31-89.

29. NL's Motion For Leave to Join Third Party Defendant filed 5-03-89.

30. Youell's Amended Third Party Action, filed 5-05-89.

31. INA's Request for Admissions, filed 5-08-89.

32. Plaintiffs' Second Set Request for Admissions to NL Industries, filed 5-26-89.

33. Plaintiffs' Second Set of Request for Admissions to Youell, filed 5-26-89.

34. Plaintiffs' Second Set of Request for Admissions to INA, filed 5-26-89.

35. Plaintiffs' Objections to INA's Request for Admissions, filed 6-08-89.

36. Response of Youell to Plaintiffs' Request for Admissions, filed 6-29-89.

37. INA's Answers to Plaintiffs' Second Set Request for Admissions, filed 6-29-89.

38. NL's Responses to Plaintiffs' Second Set of Requests for Admissions

39. Plaintiffs' Responses to INA's Request for Admissions, filed 7-05-89.

40. Plaintiffs' Amended Second Set Request for Admissions to INA, filed 7-07-89.

41. Order Granting Leave to Join Third Party Defendant English and American, dated 7-12-89.

42. Order Granting Leave to File Third Party Action Against Travelers, dated 7-12-89.

43. Youell and Companies Third Party Action Against Travelers and English and American, filed 7-13-89.

44. INA's Answers to Plaintiffs' Amended Second Set Request for Admissions, filed 8-02-89.

45. Order Granting Youell's Leave to File Third Party Action Against Travelers and English and American, dated 8-07-89.

46. Youell and Companies Amended Third Party Action Against Travelers and English and American, filed 8-07-89.

47. NL's Request for Admissions, filed 8-31-89.

48. Travelers' Original Answer, filed 9-15-89.

49. Plaintiffs' Responses to Request for Admissions of NL Industries, filed 9-15-89.

50. Plaintiffs' Motion for Partial Summary Judgment, filed 9-20-89.

51. Special Appearance of English and American, filed 9-22-89.

52. Original Answer of English and American, filed 9-25-89.

53. INA's Supplemental Answer to Plaintiffs' Second Amended Petition, filed 11-03-89.

54. Defendant Youell and Companies Supplemental Answer to Plaintiffs' Second Amended Petition, filed 11-08-89.

55. NL's Supplemental Answer, filed 11-09-89.

56. NL's Amended Response to Getty's Second Set Request for Admissions, filed 11-13-89.

57. Supplemental Affidavit of W. Allen Brumley in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 11-14-89.

58. Second Supplemental Affidavit of W. Allen Brumley in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 11-16-89.

59. Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 11-16-89.

60. Plaintiffs' Third Amended Petition, filed 11-16-89.

61. Defendant INA's Second Amended Answer, filed 11-16-89.

62. Youell and Companies' Second Amended Answer, filed 11-16-89.

63. Affidavit of W. Allen Brumley in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 12-21-89.

64. Order Denying Plaintiffs' Motion for Summary Judgment, signed 11-17-89.

65. Defendants NL, INA and Youell's Motion for Summary Judgment and Affidavit of Douglas Haldane, filed 11-28-89.

66. Plaintiffs' Second Motion for Partial Summary Judgment, filed 12-21-89.

67. English and American's Response to Defendants' Motion for Summary Judgment, filed 01-05-90.

68. Plaintiffs' Response to Defendants' Second Motion for Summary Judgment, filed 01-05-90.

69. Defendants' Reply to Response to Motion for Summary Judgment, filed 1-11-90.

70. Letter from Judge Lindsay to all attorneys, dated 1-26-90.

71. Appendix to Defendants' Amended Motion for Summary Judgment, filed 2-08-90.

72. Defendants' Amended Motion for Summary Judgment, filed 2-08-90.

73. Order Setting Trial and Pretrial Conference, signed 2-12-90.

74. Defendants' Supplement to Amended Motion for Summary Judgment, filed 2-22-90.

75. Plaintiffs' Fourth Amended Petition, filed 2-27-90.

76. English and American's Response to Defendants' Amended Motion for Summary Judgment, filed 3-02-90.

77. Plaintiffs' Response to Defendants' (Third) Motion for Summary Judgment, filed 3-02-90.

78. Letter from Judge Lindsay to Counsel, Setting Trial for April 9, 1990, dated 3-05-90.

79. Supplemental Response to Interrogatories filed by INA, filed 3-08-90.

80. Plaintiffs' First Supplemental Responses to INA's Request for Admissions, filed 3-09-90.

81. Defendant NL's Answers to Plaintiffs' Third Set Request for Admissions, filed 3-16-90.

82. NL's answers to Plaintiffs' Fourth Set Request for Admissions, filed 3-23-90.

83. Order Regarding Pleadings Considered Part of Summary Judgment Record, signed 3-23-90.

84. First Amended Answer of NL Industries, filed 3-30-90.

85. Defendant INA's Third Amended Answer, filed 3-30-90.

86. Order After Pretrial Conference, signed 3-30-90.

87. Joint Pretrial Order, filed 4-04-90.

88. Order for Separate Trial on 4-09-90, signed 4-09-90.

89. Charge of the Court and Verdict of the Jury, filed 4-___-90.

90. Plaintiffs' Motion for Entry of Interlocutory Judgment and Hearing on Entry of Summary Judgment, filed 4-24-90.

91. Defendants' Motion to Sever and Abate Third Party Claims, filed 5-02-90.

92. Order of Severance and Abatement, signed 5-03-90.

93. Order Denying Plaintiffs' Motion to Make the Record of the Trial Part of the Summary Judgment Record, signed 5-03-90.

94. Order Granting Defendants' Motion for Summary Judgment, signed 5-03-90.

95. The Court's docket sheet.

96. Clerk's Certificate of Deposit in Lieu of Cash Bond.

97. Certified bill of costs.

98. This Designation of Transcript.

99. Deposition of Russell Keenan (Vol. 1, 7/7/89 and Vol. 2, 10/3/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant

to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

100. Deposition of Donis McCluskey (Vol. 1, 7/20/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

101. Deposition of Earnest Tate (Vol. 1, 8/28/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

102. Deposition of John Carpé (Vol. 1, 8/29/89 and Vol. 2, 9/12/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

103. Deposition of Cloy Monzingo (Vol. 1, 10/17/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to Photocopy same.

104. Deposition of James B. Merrell (Vol. 1, 10/26/89 and Vol. 2, 10/27/89), filed with the Court, the original of which is to be

forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

105. Deposition of W. Allen Brumley (Vol. 1, 11/7/89 and Vol. 2, 11/7/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

106. Deposition of Michael G. Lamont (Vol. 1, 4/4/90), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Amended Designation of Transcript was served upon counsel of record as listed below by certified mail, return receipt requested, on this ___ day of June, 1990.

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APPENDIX E

NO. 89-01695

GETTY OIL CORPORATION, Succeeded by and a Division of TEXACO, INC., Plaintiff, VS. INSURANCE COMPANY OF NORTH AMERICA; NL INDUSTRIES, INC., d/b/a NL TREATING CHEMICALS INC.; and YOUELL & COMPANIES, Defendants.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 280TH JUDICIAL DISTRICT

AMENDED MOTION FOR SUMMARY JUDGMENT

Defendants NL Industries, Inc. ("NL"), Insurance Company of North America ("INA") and Youell and Companies ("Youell") move for summary judgment pursuant to Rule 166a of the Texas Rules of Civil Procedure.

I.

Preliminary Statement

Defendants request summary judgment on the following grounds:

1. As a matter of law, the NL-Getty contract under which Plaintiff has sued cannot be construed to provide additional insured status for Getty under NL's insurance policies.

2. The scheme of insurance and indemnity contained in the NL-Getty contract violates the Texas Oil Field Anti-Indemnity Statute is therefore void and unenforceable.

3. Texaco's claims are barred by res judicata and collateral estoppel.

Each of these grounds forms an independent basis for summary judgment. There are no genuine issues of material fact precluding summary judgment on any of these grounds.

II.

Background Facts

On November 22, 1983, Getty sent Carl Duncan, an independent contractor working for Getty, to the site of a well owned by Getty to perform some welding work. The well was a producing oil well. During the welding on the well's horse-head, an accident occurred which resulted in Mr. Duncan's death.

The Duncan plaintiffs sued Getty, Texaco, NL and others.[1] Getty and Texaco cross-claimed against NL for contribution and indemnity based on the "work order conditions" of a Getty purchase order, HB-5357 (Exhibit "A" of Texaco's 1st Amended Original Petition in the present suit). Exhibit 1.[2] The jury found Getty solely

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[1] *Duncan, et al. v. Getty Oil Corporation, et al.*, Cause No. 84-S-0194-C in the 130th Judicial District Court of Matagorda County, Texas (hereinafter, "*Duncan*").

[2] Exhibits, unless otherwise indicated, are contained in Appendix C.

negligent and grossly negligent, and exonerated NL from any wrongdoing. All product liability claims against NL were rejected. The Court rendered Judgment on this verdict and also held that NL was not liable to Getty or Texaco for contribution or indemnity. This judgment was affirmed on appeal.

Notwithstanding the loss on their cross-claim in the *Duncan* suit, Texaco filed this suit in Galveston County contending that the work order conditions of HB-5357 required NL to make Getty an additional insured on NL'S insurance policies. The suit was removed to Federal Court and was ultimately dismissed by The Honorable Hugh Gibson on the basis of res judicata and collateral estoppel. Exhibit 2. The Fifth Circuit, without addressing the res judicata and collateral estoppel arguments, remanded the case to Judge Gibson because of a diversity issue. Judge Gibson later remanded the case to state court and it was ultimately transferred to this court.

III.
Texaco's Construction Of The Contract Is Wrong As A Matter Of Law

Contrary to Texaco's claims, HB-5357 does not require NL to make Getty an additional insured on NL's insurance policies. The term "additional insured" never appears in HB-5357. Instead, paragraph 4 of the work order conditions (titled "Insurance and Indemnity") states merely that NL's insurance "shall extend to and protect" Getty "to the full amount of such coverages." Under Texas law, such language does not require an indemnitor such as NL to provide insurance covering the

negligence of an indemnitee such as Getty. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823 (Tex. 1972).

In *Fireman's Fund*, the Texas Supreme Court, construing a contractual provision nearly identical to the one involved here, held as a matter of law that an agreement to purchase insurance "for the protection of" an indemnitee does not create an obligation to provide insurance covering the indemnitee's negligent acts.[3]

The insurance provision involved in *Fireman's Fund* is substantially similar to the insurance provision in HB-5357. It provided:

> 12. LIABILITY COVERAGE
>
> The Contractor shall *protect* the Owner . . . against all liabilities . . . or damages . . . growing out of the performance of work . . .
>
> * * *

---

[3] The same result necessarily follows from ordinary rules of contract construction. A contract is to be strictly construed against its drafter; here, Getty. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). It would have been easy for Getty to use the term "additional insured" if that is what it meant. Indeed, Getty used that terminology in its contract with Carl Duncan. Exhibit 9. Since Getty did not use the term "additional insured" in HB-5357, it cannot be construed to require NL to make Getty an additional insured. Similarly, the contract states that NL "shall not be held responsible for any . . . expenses . . . directly, solely, and proximately caused by the negligence of" Getty. Thus, NL cannot be responsible for the insurance expense attributable to Getty's sole negligence.

> Limits for Liability Insurance shall be not less than $100,000 for injury to one person, $300,000 for injury to more than one person and $100,000 for property damage.
>
> * * *
>
> In addition to the Liability Insurance *for the protection of* the Owner and Architect-Engineer, the Contractor shall . . . maintain Liability Insurance for injury and/or death to any of his employees and/or to other persons. . . .

490 S.W.2d at 821 (emphasis added). A separate paragraph of the contract in *Fireman's Fund* also provided that the Contractor "shall specifically and distinctly assume and do so assume all risks of damage or injury from any cause except negligence of the Owner." *Id.* Similarly, paragraph 4 of the work order conditions of HB-5357 states that NL shall not have any responsibility for damages caused by the sole negligence of Getty.

The trial court and court of appeals in *Fireman's Fund* held that the insurance provisions of the contract rendered the contractor and its insurers liable for the indemnitee's negligence. The Texas Supreme Court reversed that holding and held as a matter of law that the insurance provisions did not require coverage of the indemnitee's negligence and could not render the contractor or its insuror liable for the indemnitee's negligence:

> We cannot agree with the contention of Byrne and Commercial that the requirement in Section 12 that Wallace carry certain liability insurance *for the protection of* General Motors evidenced an intention to cover the negligent acts of the latter. While the meaning of the contract provisions are

> not clear, the most reasonable construction is that they were to assure performance of the indemnification agreement as entered into by the parties. Such provisions are often required to guard against insolvency of the indemnitor, and they should not be considered as any evidence of intent to broaden the contractual indemnity obligation.
>
> * * *
>
> Therefore, we disapprove the holdings of the lower courts to the contrary.

490 S.W.2d at 823 (emphasis added). *Accord, Nesom v. Chevron U.S.A., Inc.*, 633 F. Supp. 55, 59 (E.D. La. 1984). The Supreme Court's holding applies directly to the present case. The only permissible reading of the contract is the one urged by NL and applied by the Texas Supreme Court in *Fireman's Fund*. The insurance provision cannot broaden NL's liability for Getty's negligence and NL is not required to provide coverage for Getty's sole negligence.

The Texas Supreme Court's holding in *Fireman's Fund* has been made even more compelling by later decisions. *Fireman's Fund* was decided under the "clear and unequivocal" test then applied to indemnity agreements. The Texas Supreme Court later adopted the even stricter "express negligence" doctrine which prohibits attempts to render one party liable for another's negligence where the express negligence test is not met. *Ethyl v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987). The "express negligence" doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must state that intent in specific terms

within the four corners of the contract. *Ethyl Corp.*, 725 S.W.2d at 708. The Supreme Court's reason for adopting the express negligence doctrine applies here:

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.

Id. at 707-08. Here, Texaco is trying to do indirectly what the Texas Supreme Court and the legislature have prohibited – to render NL and its insurors liability for Getty's sole negligence by clever draftmanship. It cannot do so. *See Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App. – San Antonio 1989, no writ) (Under express negligence doctrine and anti-indemnity statute, regardless of whether contractor breached a covenant in the contract, other party was not entitled to be indemnified for damages he was required to pay because of his own fault).

It must be emphasized that, under *Fireman's Fund* and *Ethyl*, the construction of this contractual provision is a legal issue for the Court and can never be a jury issue. As a general rule, construction of a contract is a question of law for the court. *Louisiana-Pacific Corp. v. Cain*, 519 S.W.2d 528, 529 (Tex. Civ. App. – Beumont 1974, writ ref'd n.r.e.). Ordinarily, extrinsic evidence is admissible only if,

after applying applicable rules of construction, genuine uncertainty remains as to the proper construction of the contract. However, in construing indemnity and insurance provisions of a contract like the one involved here and in *Fireman's Fund,* extrinsic evidence is never admissible or relevant; *any* ambiguity *must* be resolved against holding one party liable for the other party's negligence. *Monsanto Company v. Owens Corning Fiberglass Corp.,* 764 S.W.2d 293 (Tex. App. – Houston [1st Dist.] 1988, no writ). The insurance provision in the contract does not alter this result. *See Fireman's Fund, supra; Adams v. Spring Valley Construction Co.,* 728 S.W.2d 412 (Tex. App. – Dallas 1987, writ ref'd n.r.e.).

As a matter of law, HB-5357 and the provisions of the work order conditions of HB-5357 cannot be construed to require NL to provide insurance covering Getty's solely negligent acts. Defendants are therefore entitled to summary judgment.

IV.

The Texas Anti-Indemnity Statute Bars Texaco's Claims

A. The Texas Statute

Although the rules established by *Fireman's Fund, Ethyl* and their progeny are strict, the legislature felt that even more stringent protection was needed for oil field contractors. Accordingly, the legislature enacted the Texas Oil Field Anti-Indemnity Statute; Tex. Rev. Civ. Stat. Ann. art. 2212b (Vernon 1979) (hereafter cited as "Article 2212b").

* * *

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Supreme Court, U.S.
FILED
JUL 27 1993

No. 92-1915

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

YOUELL AND COMPANIES,

Petitioners,

VS.

GETTY OIL COMPANY AND
TEXACO INC.,

Respondents.

On Writ of Certiorari to the Texas Supreme Court

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners believe that their Petition adequately states grounds for granting a Writ of Certiorari. Nevertheless, they submit this Reply to Respondent's Opposition to Petition for Writ of Certiorari to address some issues raised by Respondent.

I. Petitioners Did Not Misstate The Texas Supreme Court's Ruling.

Respondent incorrectly states that Petitioners attempted to mislead this Court by implying that the Texas Supreme Court granted final summary judgment for Respondent and disposed of the case below. Petitioners quoted the Texas Supreme Court's objectionable ruling in the Statement of the Case. Petition, at pp. 3-4. As Petitioners explained in their Petition, the Texas Supreme Court did not expressly grant summary judgment for Respondent, but rather *effectively* granted partial summary judgment. It resolved a key issue which was, in fact, the subject of Respondent's motion for partial summary judgment. *See* R. 785-795. Respondent's motion, however, was not on appeal and Petitioners' responses were not in the appellate record. Thus, the ruling of the Texas Supreme Court, fairly interpreted, removes a key issue from contention and amounts to grant of a motion for partial summary judgment for Respondent without any opportunity for Petitioners to be heard.

Petitioners' point is simply that this Court must look to the actual *effect* of the Texas Supreme Court's ruling, and to the fact that it has excluded Petitioners from any opportunity to be heard on a key issue.

The ruling of the Texas Supreme Court has become the law of the case. Petitioners have been permanently deprived

of their opportunity to raise their objections in a meaningful forum. The trial court does not have the authority to change the Texas Supreme Court's ruling, and the effect of the unconstitutional ruling will color the rest of the trial court proceedings on remand, spreading the effect of this deprivation of rights. That is the sense in which the Texas Supreme Court "effectively" granted Respondent a partial summary judgment, and that is what the Petition states.

II. The Requirement Of Notice And An Opportunity To Be Heard Applies To Factual And Legal Arguments.

Respondent attempts to distinguish Petitioners' cases on due process by suggesting that due process requires only the opportunity to present factual arguments, and not the opportunity to present legal arguments. Respondent cannot, however, avoid clear statements of the law to the effect that the opportunity to present both factual and legal arguments is protected. This was stated clearly in *Powell v. U.S.*, 849 F.2d 1576, 1579-82 (5th Cir. 1988); "the district court must give proper notice to insure that the non-moving party had the opportunity to make every possible *factual and legal* argument." (Emphasis added). *Accord Williams v. City of St. Louis*, 783 F.2d 114, 116 n.1 (8th Cir. 1986) ("The [defendant] suggests that because the contested ordinance was before the court, 'the only opportunity conceivably lost to plaintiffs was the presentation of legal arguments. . . .' This is precisely the reason that we find the grant of summary judgment inappropriate. As we have already noted, there are no factual issues to resolve here. The denial of an opportunity to make legal arguments is exactly what rule 56 is intended to prevent.")

Petitioners are entitled to join issue against the grant of a summary judgment ruling for Respondent. Due process

analysis focuses on the opportunity to be heard, without reaching, at this stage of the analysis, the merits of the defenses that might have been interposed. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988). While many cases focus on the opportunity to develop facts, the federal due process standard requires that notice of the *legal* issue, and the opportunity to join the debate on that legal issue, must be preserved.

Respondent also appears to miss the point that there is a vast difference between submitting that there are no material facts on a motion for summary judgment, and admitting that there are no material facts for purposes of a counter-motion. *See Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700, 703 (7th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956); *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).[1]

In this context, Respondent stated that its responses to Petitioners' motion for summary judgment below *were* in the appellate record.[2] That may be, but the relevant point is that Petitioners' *responses* to Respondent's motion were *not* in the record. The Texas Supreme Court did not have Petitioners' arguments against Respondent's position before it in any form. A court may be justified in ruling on a motion previously

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[1] Respondent misconstrues *Prepo* and *Mingus Constructors*. Petitioners did not contend that those cases were relevant because of the finality of the judgments there (as suggested by Respondent). *Prepo* and *Mingus Constructors* demonstrate, rather, that the absence of material facts under movant's proposed legal interpretations may not be equated with an absence of material facts under other legal interpretations. This point emphasizes the difference between ruling in favor of a movant and ruling in favor of the non-movant in a system of alternative pleading.

[2] Brief in Opposition, at 13.

denied *if* it has access to the relevant pleadings and arguments that framed the issues and made the motion ripe for decision. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283-84 (5th Cir. 1993). The Texas Supreme Court simply did not have before it any of the documents necessary to a full consideration of the issue it decided, and that denied Petitioners their constitutional right to due process.

Respondent attempts to minimize the impact of due process in summary judgment proceedings. The summary judgment procedure is a common tool for efficient disposition of civil cases throughout the United States; it is therefore vital that this Court preserve due process in that procedure.

III. Texas Law Makes The Opportunity To Present Surrounding Factual Circumstances As Well *As Legal Arguments* Relevant.

Respondent suggests that nothing Petitioners could have raised could impair the Texas Supreme Court's authority to rule as it has done. First, the Texas Supreme Court has no authority to render decisions without meeting basic due process requirements. Contrary to Respondent's contentions, the ability to raise *legal* arguments is a protected right.

Second, if Respondent means that any response by Petitioners would be doomed to failure, there is simply no way to evaluate that position. That is the point of the Petition. The Texas Supreme Court could not have known whether Petitioners' responses might have made a difference because they were not in the record and Petitioners had no opportunity to present their arguments. Further, Texas law requires a court to consider the "surrounding circumstances" when seeking to interpret the face of a contract. This does not mean that the court may reach all issues possibly bearing on interpreta-

tion, such as parol evidence and intent; but simply means that the "surrounding circumstances," such as industry custom and practice, may be considered as a tool to interpret the contract. *E.g. KMI Continental Offshore Production Co. v. ACF Petroleum Co.*, 746 S.W.2d 238, 241 (Tex. App.—Houston [1st Dist.] 1987, writ denied); *Airmark, Inc. v. Advanced Systems, Inc.*, 715 F.2d 229, 230 n.1 (5th Cir. 1983) (Texas law).[3] Petitioners are entitled to the opportunity to assert all matters that are relevant under Texas law, and the opportunity sought is real, not theoretical.

IV. Conclusion

The ruling of the Texas Supreme Court, while not an express grant of summary judgment in favor of Respondent, does in fact grant a ruling sought by Respondent in its motion for partial summary judgment. Further, it disposes of an important issue in the case adverse to Petitioners, and will result in further prejudice to Petitioners in the trial court below upon remand unless addressed at this stage of the proceedings.

Respectfully submitted,

JACK G. CARNEGIE
Attorney of Record

[3] Respondent also attempts to accord the verdict from the prior mini-trial in this case some significance in supporting the Texas Supreme Court's ruling. A verdict upon which no judgment has been entered does not have any effect, so, despite Respondent's suggestion, Petitioners' statement that "it has never been determined that a contract exists or that it applies to the underlying circumstances" is correct. Respondent conceded this point before the Texas Supreme Court.

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